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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

ILLINOIS CENTRAL GULF RAILROAD COMPANY, a corporation,
Petitioner,

vs.

ROBERT EARL MISTER, on behalf of himself and all others similarly situated,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals For the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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IC Industries is the parent corporation of the petitioner. Petitioner has no other parent companies, non-wholly owned subsidiaries, or affiliates.

QUESTIONS PRESENTED FOR REVIEW

I. Did the appellate court fail to apply the clearly erroneous standard of review mandated by Fed. R. Civ. P. 52(a) to the district court's findings of fact?

II. Did the appellate court improperly impose on defendant a burden of persuasion rather than production in rebutting plaintiffs' prima facie disparate treatment in hiring case, thereby placing the burden on defendant to prove it did not intentionally discriminate?

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OPINIONS BELOW

The decisions of the United States Court of Appeals for the Seventh Circuit is reported at *Mister v. Illinois Central Gulf Railroad,* 832 F.2d 1427 (7th Cir. 1987). The decision of the United States District Court for the Southern District of Illinois is reported at *Mister v. Illinois Central Gulf Railroad,* 639 F. Supp. 1560 (S.D. Ill. 1986).

RULE INVOLVED

(a) **Effect.** In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and

state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. It will be sufficient if the findings of fact and conclusions of law are stated orally and recorded in open court following the close of the evidence or appear in an opinion or memorandum of decision filed by the court. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b). Fed. R. Civ. P. 52(a).

JURISDICTION

The judgment of the United States Court of Appeals for the Seventh Circuit was entered on October 29, 1987. Rehearing was denied on December 7, 1987. The jurisdiction of this court is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

This petition is filed because the United States Court of Appeals for the Seventh Circuit has departed from the accepted and usual course of judicial proceedings in disregarding the trial court's findings of fact in this case. The petition addresses the conflict between the appellate court decision in this case and this court's decision in *Anderson v. City of Bessemer City*, 470 U.S. 564 (1985) interpreting the "clearly erroneous" standard of review mandated by Federal Rule of Civil Procedure 52(a). Finally, the petition addresses conflicts between the appellate court decision and the decision of this Court in *Texas Depart-*

ment of Community Affairs v. Burdine, 450 U.S. 248 (1981) pertaining to the quantum of evidence required to sufficiently respond to a plaintiff class' prima facie pattern or practice disparate treatment case under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000 *et seq.*, and 42 U.S.C. § 1981.

Mister v. Illinois Central Gulf Railroad, 639 F.Supp. 1560 (S.D. Ill. 1986), *aff'd in part, rev'd in part,* 832 F.2d 1427 (7th Cir. 1987), was filed in 1981 as an "across-the-board" class action alleging that petitioner, Illinois Central Gulf Railroad Company (hereinafter referred to as "ICG" or "defendant") discriminated against blacks in hiring, promotion, pay, termination, and other terms and conditions of employment. (Complaint); 639 F. Supp. at 1562. Robert Earl Mister also filed an individual claim of intentional discrimination in hiring. (Complaint); 639 F. Supp. at 1562. Jurisdiction of the district court was based on 28 U.S.C. § 1343. Prior to trial, the scope of the class and time frame of alleged discrimination was significantly narrowed. (Court's Order of November 4, 1982). The court certified a potentially large class. (Court's Order of November 4, 1982). The case was tried on the plaintiff class' claim that between January 9, 1976 and January 9, 1981 black persons had been subjected to either intentional discrimination or an alleged discriminatory practice by ICG in hiring employees for its St. Louis Division, a large administrative unit with multiple job sites and one centrally located administrative office. (Court's Order of November 3, 1981; Tr. 1483-84). Judgment was entered for ICG in both the individual and class action by the Chief Judge of the United States District Court for the Southern District of Illinois after an eighteen day trial. (Judgment dated August 7, 1986). A fifty-five page Memorandum and Order was filed by the trial judge reciting his appraisal of the weight and credibility to be given to the crucial and voluminous statistical and anecdotal testimony and exhibits presented by both parties at trial. (Memorandum and Order of August 7, 1986). On appeal, the United States Court of Appeals for the Seventh Circuit

in a *de novo* review of the facts set aside the trial court's findings of fact, reversed outright the judgment for defendant in the class action, and with a certain incongruity affirmed the judgment for defendant in the class representative's individual case. *Mister v. Illinois Cent. G. R.R.*, 832 F.2d 1427 (7th Cir. 1987). The appellate court remanded the case to the district court for a trial on remedies which is currently pending disposition. 832 F.2d at 1438. Remedies sought include back pay for hundreds of potential claimants, punitive damages, equitable relief and attorneys fees.

The trial court noted in its Memorandum and Order that there existed prior to trial, and even at trial, confusion concerning plaintiffs' legal theory. 639 F.Supp. 1566-67. The court concluded that despite this confusion, the plaintiff class had proceeded on two separate theories. 639 F. Supp. at 1566. The first theory was one of intentional disparate treatment of the class by ICG in hiring decisions for its St. Louis Division. 639 F. Supp. at 1566-67. The second theory was that a facially neutral employment practice had a disparate impact on the employment of blacks either through the application of an invalid objective policy or the subjective application of that policy. 639 F. Supp. at 1567. The trial court ruled that a pattern or practice intentional disparate treatment case is established primarily, if not exclusively, by statistical evidence. 639 F. Supp. at 1566. The trial court rejected plaintiffs' attempt to establish a pattern or practice disparate treatment claim by presenting a collection of individual claims of discrimination in hiring. 639 F. Supp. at 1566-67. The trial court held that the plaintiff class could establish a prima facie case of disparate impact by proving that an objective pass/fail employment practice or policy utilized by the defendant excluded blacks from employment in a disproportionate number. 639 F. Supp. at 1567. Over the objection of the defendant, the trial court also held that the plaintiff class could establish a prima facie disparate impact case by proving that a policy or practice of the defendant, although not a pass/fail test, was applied in an excessively subjective manner resulting in

a disproportionately low number of black hires. 639 F. Supp. at 1567. (The validity of this latter excess subjectivity model of disparate impact is presently pending before this court in *Watson v. Fort Worth Bank & Trust,* 798 F.2d 791 (5th Cir. 1986), *cert. granted,* ____ U.S. ____, 107 S.Ct. 3227 (1987)).

The evidence at trial established that ICG is a railroad operating between Chicago, Illinois, and New Orleans, Louisiana. (Defendant's Exhibits 48 A-F). During the relevant time frame the ICG's St. Louis Division was one of a number of divisional administrative units which were constantly being reorganized and consolidated as the company was reduced in size. (Tr. 1502-03). From 1976 through 1980, the St. Louis Division was administered from the division office located at Carbondale, Illinois which is approximately 100 miles southeast of St. Louis, Missouri. (Defendant's Exhibit 48 A-F; Tr. 1483-84). During those years the St. Louis Division reached into portions of four states (Illinois, Kentucky, Missouri, and Tennessee) as its boundaries were continuously rearranged. (Defendant's Exhibit 48 A-F). From time to time during those years the St. Louis Division administrative unit employed workers for rail lines and yards as far west as Kansas City, Missouri; as far east as Centralia, Illinois; as far north as Champaign, Illinois; and as far south as Louisville, Kentucky. (Defendant's Exhibit 48 A-F). The division area encompassed thousands of square miles in predominantly rural areas. (Defendant's Exhibit 48 A-F).

Between 1976 and 1981, there were as many as forty different job sites distributed throughout the St. Louis Division on ICG's rail lines. (Defendant's Exhibit 4). Each job site had its own work force hired independently from other job sites. (Tr. 821-22).

Hiring on the St. Louis Division was administered at the Carbondale division office by a clerk who was responsible for receiving all applications for employment and filling entry level jobs throughout the division. (Tr. 880-81).

Both in the plaintiffs' and the defendant's cases, testimony was presented by the division superintendent and the hiring clerk that ICG had a long standing policy and practice of hiring entry level employees who resided as close as possible to each job site on the St. Louis Division. (Tr. 575-76).

The plaintiffs attempted to establish that ICG's hiring clerk applied a pass/fail 50 mile rule to its hiring decisions for each job site, that all persons from within 50 miles were qualified and that all people outside a 50 mile radius were not qualified. Plaintiff also attempted to present an alternative and inconsistent theory that defendant exercised excessive subjectivity in using distance of a prospective employee's residence from a given job site in making hiring decisions for the St. Louis Division. The trial court found that the weight of the testimony and evidence was that defendant did not have a pass/fail 50 mile test. 639 F. Supp. at 1580. The trial court's analysis of the excess subjectivity standard will be treated below.

The factual determination of the appropriate labor markets from which ICG did its hiring was the crucial issue of fact in this case. 832 F.2d at 1430; 639 F. Supp. at 1577. Plaintiffs' statistical evidence treated defendant's St. Louis Division as one large all-encompassing labor market in which all applicants sought all available jobs regardless of the applicant's place of redidence or the location of the job site. 832 F.2d at 1430. Applicants from hundreds of miles away from a job site were treated as part of the labor market for that job site. No test was performed by plaintiffs' expert to confirm his selection of the entire division as the appropriate labor market and none was performed to identify any other appropriate labor market for each job site. (Tr. 1164-1170).

The plaintiff class expert's study disregarded the location of an applicant's residence and disregarded the location of the sites of available jobs and compared the aggregate number of black and white applicants to the aggregate number of black and white hires throughout the division. 639 F. Supp. 1568-69; Tr.

1165-66. Without accounting for local markets, the plaintiffs' study showed large deviations from the norm of expected black hires. 639 F. Supp. at 1568-69; Tr. 1166-70. Over objection, plaintiffs' expert testified that in his opinion these statistical deviations were the result of intentional discrimination against blacks. (Tr. 963-1109). Contrary to accepted professional standards, plaintiffs' expert chose to do only those calculations he was directed to do by class counsel and failed or refused to test for factors other than race such as local labor markets or the application of a distance factor in hiring decisions that would account for the large standard deviations. (Tr. 1109-1212).

In addition to plaintiffs' statistical study, the plaintiff class presented anecdotal evidence at trial concerning a group of individuals who claimed that they had been denied employment as a result of intentional discrimination after being referred to ICG's Carbondale hiring office on a single day by an unauthorized employment agency. 639 F. Supp. at 1570. The plaintiff class also called ICG's St. Louis Division superintendent and hiring clerk as adverse witnesses who presented testimony supporting ICG's defense and who failed to provide any testimony supporting the allegations of intentional discrimination made by the plaintiff class. Finally, the plaintiff class presented mathematical calculations that were performed by the class counsel concerning the number of black and white persons who were hired from beyond 50 miles from their job site. (Plaintiffs' Exhibit No. 86).

The trial court made specific findings of fact concerning plaintiffs' anecdotal evidence offered to support its pattern or practice disparate treatment claim. First, the trial court ruled that the unauthorized employment agency group of individuals could not prove a pattern or practice disparate claim by stringing together alleged incidents of individual discrimination without providing an adequate statistical study of ICG's hiring practices. 639 F. Supp. 1566-67. Second, the trial court found

that the testimony of the ICG employee witnesses called by plaintiff supported ICG's position that it had numerous local labor markets, that there was no 50 mile rule, that ICG did apply a distance factor in its hiring decisions, and that the distance factor was related to the "legitimate interests of the defendant's business." 639 F. Supp. at 1577, 1580. The trial court specifically ruled that "the plaintiffs have not alleged, nor was evidence presented to show, that the defendant applied the distance factor in a discriminating way . . . ." 639 F. Supp. at 1580. Finally, the trial court weighed mathematical calculations presented by plaintiffs' counsel that out of the 122 individuals hired from a distance of more than 50 miles during the period for which the class was certified, only 3 were black, and found:

> These bare numbers do not indicate when the hires occured, whether black applicants were also available, the distance from the work place of the white hires as compared to the black hires, or the job categories into which the hires were made. Obviously, such specifics would be necessary before an inference of discrimination could be drawn.

639 F. Supp. at 1580.

The trial court found that plaintiff's statistical presentation met the minimal burden of proof required to establish a prima facie pattern or practice disparate treatment case. 639 F. Supp. at 1579. Also, the trial court ruled that plaintiffs had established a prima facie excess subjectivity disparate impact case because of the ICG's method of applying distance as a factor in making its hiring decisions on the St. Louis Division. 639 F. Supp. at 1579.

To rebut a prima facie class pattern or practice intentional disparate treatment case it was defendant's burden merely to articulate a legitimate non-discriminatory reason for the statistical deviations shown in plaintiffs' study. *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 254 (1981). Defen-

dant's burden was a minimal burden of production and not of persuasion. 450 U.S. at 254-56.

To meet its burden of production, defendant presented the testimony of its own statistical expert and the testimony of company witnesses concerning its hiring practices on the St. Louis Division. 639 F. Supp. at 1570-73.

Defendant's statistical expert tested defendant's claim that it hired from numerous local labor markets applying distance as a factor in its hiring decisions rather than from a division-wide market. (Tr. 1648-60). The expert measured the distance of residence of every person hired on the division from that person's job site. (Tr. 1648-60). The study showed that ICG hired a very large percentage of its employees for all job sites from a distance of less than 50 miles and that ICG had a local labor market for each job site. 639 F. Supp. at 1570, 1577; Tr. 1648-60; Defendant's Exhibit No. 24. The statistical expert also confirmed ICG's employee testimony concerning ICG's long-standing policy and practice of local hiring. (Defendant's Exhibit No. 24).

Defendant's statistical studies showed how the failure of plaintiffs' expert to control for local markets and the distance factor would explain the large statistical deviations in plaintiffs' statistics. 639 F. Supp. at 1570-73. A large percentage of ICG's jobs and job sites on its St. Louis Division were in predominantly white areas with few black residents. (Defendant's Exhibit No. 4, DCLFALLF, pp.19-21; Defendant's Exhibit No. 7 and 14, 639 F. Supp. at 1579). ICG was hiring most of its employees for job sites in rural areas and not for job sites in urban areas in the division where there were relatively many black people in the work force. (Defendant's Exhibit No. 4, DCLFALLF, pp. 19-21).

Defendant's expert also performed rigorous demographic analyses comparing defendant's hires by race to racial availabilities in each of its local markets based on U.S. Census data. 639

F.Supp. at 1571-73; Tr. 1630-1700. The demographic analysis, similar to one performed by the Equal Employment Opportunity Commission, showed that defendant was hiring on a race-neutral basis in each of its numerous local markets. 639 F.Supp. at 1571-73; Tr. 1629-31. The more limited EEOC study produced the same results. (Tr. 2195-2202).

The defendant also presented the unchallenged and unrebutted testimony of its Equal Employment Opportunity officer, its St. Louis Division superintendent, and its St. Louis division hiring clerk concerning the application of its long-standing policy and practice of using distance from job site as a factor in its hiring decisions, concerning its local labor markets, and finally concerning numeous justified business records for its policy and practice of hiring locally rather than from throughout the division. 639 F.Supp. at 1573, 1577-79; Tr. 1483-88.

The evidence showed that distance as a factor in hiring was necessary to defendant's business. In case of a derailment or other emergency, it was necessary that workers were available on extremely short notice. (Tr. 1486-96). Workers who lived great distances from their job site had a consistent pattern of absenteeism and tardiness. (Tr. 1487-88). In addition, based on seniority and the collective bargaining agreement, employees would leave the job site for which they were hired and take jobs close to the residence stated in their application when jobs there became available. (Tr. 1488-96). This created severe problems and expenses related to retraining of employees and hiring. Tr. 1486-96). Finally, community relations considerations compelled ICG to hire local unemployed persons. (Tr. 1486-96).

Plaintiffs chose not to rebut defendant's statistical testimony and business justification evidence which articulated its ultimate nondiscriminatory reasons for the disparaties contained in plaintiffs' statistics. Plaintiffs never presented statistical evidence to rebut defendant's anecdotal and statistical evidence of local hiring in local markets. 639 F.Supp. at 1577-79. In cross-examination of the Equal Employment Opportunity of-

ficer, the division superintendent, and the division hiring clerk, plaintiffs attempted unsuccessfully to suggest that the concept of distance as a factor and local labor markets were developed only after charges were filed in this case. The trial court specifically found that defendant's statistical evidence of local hiring and the application of a distance factor was "unrefuted" in the record. 639 F.2d at 1577.

After extensively weighing all the evidence, the trial court in its final Memorandum and Order made three critical findings of fact:

> [1] Based on the evidence presented, the Court finds that distance from the workplace was a factor in defendant's hiring decisions. . . .
>
> [2] The Court also finds that this distance factor was justified. . . .
>
> [3] Failure of [plaintiffs' statistical expert] to account for the many individual labor markets creates an adequate rebuttal of the inference of discrimination.

639 F.Supp. at 1577.

These three findings of fact formed the sole necessary basis for the trial court's conclusion that there was no adequate evidence that defendant had intentionally discriminated in hiring against the plaintiff class and thus formed the basis for the court's judgment for the defendant in the pattern or practice disparate treatment case.

However, the trial court proceeded to find that there was no evidence in the record to support a finding that defendant's local hiring practice was in fact a pretext for discriminating against blacks. 639 F.Supp. at 1579. This finding largely turned on the unrebutted anecdotal testimony presented in both plaintiffs' and defendant's portions of the case by ICG's employees. 639 F.Supp. at 1579.

The trial court made an additional finding that the defendant's demographic analysis of its hiring decisions "accounted for" the statistical deviations shown in plaintiffs' applicant flow analysis and "was enough to rebut the inference of discriminatory treatment towards blacks" suggested by plaintiffs. 639 F.Supp. at 1579.

The trial court also found for the defendant on plaintiff's disparate impact claim on the grounds that defendant had met its burden of rebuttal to establish business necessity for its policies. As stated above, the district court found distance and local labor markets were a justified factor in ICG's hiring decisions. 639 F.Supp. at 1579. The trial court specifically concluded that "the practice of local hiring is necessary and related to [ICG's] business." 639 F.Supp. at 1579.

The trial court found that the class representative, Robert Earl Mister, failed to state a prima facie case of discrimination in his individual case. 639 F.Supp. at 1581. The defendant had presented evidence that plaintiff had lied on his application, and that lying on an application was grounds for rejection. 639 F.Supp. at 1581. The court specifically found "that the plaintiff's misstatement on his application, a fact that was *not disputed,* together with his poor work history, disqualified him for employment with the defendant." 639 F.Supp. at 1581 (emphasis by court).

The United States Court of Appeals for the Seventh Circuit reversed the district court judgment for defendant in the class pattern or practice intentional disparate treatment case. *Mister v. Illinois Cent. G. R.R.,* 832 F.2d 1427 (7th Cir. 1987). In doing so, the appellate court implicitly found that discrimination was ICG's "standard operating procedure. . . ." *International Bhd. of Teamsters v. United States,* 431 U.S. 324, 336 (1977). The appellate court did not discuss the trial court's ruling in favor of defendant on the disparate impact claim. 832 F.2d at 1429. The appellate court affirmed the decision against Robert Earl Mister in his individual case. 832 F.2d at 1437-38.

The appellate court agreed with the trial court that the plaintiff class had presented an adequate amount of evidence to establish a prima facie case with its statistical analysis based on a single division-wide labor market. 832 F.2d 1429-31. However, the appellate court recognized:

> Plaintiffs' statistical work leaves much to be desired. The plaintiffs' expert used no independent variables other than race. He assumed, in other words, that all applicants are identical in every respect except race. This is not necessarily true.

832 F.2d at 1431.

The appellate court opinion stated that: "The argument about the labor market goes to the heart of the case." 832 F.2d at 1430. It then recites that plaintiffs' expert assumed that the St. Louis Division was one large market and that ICG's defense was that it hired in local markets for each job site and that it applied distance as a factor in its hiring decisions. 832 F.2d at 1431.

The appellate court never discussed the extensive ICG non-statistical anecdotal testimony of its employees in support of its contention that it had local markets and applied distance as a factor. That unrefuted testimony alone would ordinarily adequately meet a defendant's burden of production to rebut a prima facie case and the district court so held. *Texas Dep't of Community Affairs v. Burdine,* 450 U.S. 248 (1981); 639 F.Supp. at 1577.

The appellate court opinion turned exclusively on its discussion of the statistical presentations of the parties. The court placed the burden on the defendant to show that the geographical distribution of black and white applicants' residences were uneven. 832 F.2d at 1430. It suggests that only in that event would plaintiffs' statistics be fatally flawed for having failed to take into account local markets. 832 F.2d at

1430. The appellate court, having constructed this new hurdle for a defendant in this type of case, concluded that defendant never made this showing. 832 F.2d at 1430. This is a creation by the appellate court of a burden on defendant to produce evidence on an issue of fact that was never in issue in the trial court. It is also the creation of a burden which even if valid was amply met by the production of evidence in the record and in the findings of the trial court in its Memorandum and Order. The district court found that there was uneven distribution of the races. 639 F.Supp. at 1579 (the district court concluded that blacks were applying for jobs when ICG was hiring in "predominately white areas"). The division applications for employment (which did not request racial information) in conjunction with the defendant's demographic studies showed indisputably an uneven geographic distribution of applicants by race. (Defendant's Exhibit No. 2, 4, DCLFALLF, pp. 19-21). The existence of non-uniform distribution of races within the division is also within the common knowledge of a trier of fact. The appellate court opinion expressly accepts the essential assumption of plaintiffs' single market division-wide statistical study that the races are evenly distributed. The appellate court allocates the burden on this issue to the defendant, not the plaintiff.

The appellate court next concludes that the defendant was required to "establish" that local hiring, the application of a distance factor, "accounted for" the disparity in plaintiffs' statistics. 832 F.2d at 1431-35. This allocation of burden is contested and at issue in this petition. The defendant's burden is to produce a legitimate nondiscriminatory reason for plaintiffs' statistical disparities. *Burdine*. At issue is the appellate court's imposition of a requirement that defendant prove or "establish" that its articulated reason is in fact the only one creating the discrepancies. At issue also is whether it is plaintiffs' burden as part of its overall burden of proof of intentional discrimination to prove that use of local markets, once articulated or suggested, would not change the results of its statistical studies suggesting discrimination.

The appellate court also took exception to ICG's method of statistical proof. It suggested ICG "had a straightforward" way to meet its burden (improper under the law) to show that the distance factor accounted for the plaintiffs' statistical deviations. 832 F.2d at 1432. The court suggests that ICG should have matched its applications in evidence with each available job to determine if its hiring was race neutral. 832 F.2d at 1432. The trial record discloses that such a test was impossible since the applications requested *no racial information.* (Defendant's Exhibit No. 2).

The appellate court then proceeded to perform its own statistical analysis of ICG's articulated nondiscriminatory reason, the distance factor. 832 F.2d at 1432-34. In this process it made theoretical assumptions and statistical hypotheses, collected a data base, performed complex mathematical computations including tests of statistical significance; and finally arrived at independent expert conclusions concerning the interpretation of its tests. The court's expert opinion, based on its own statistical test, was that distance could not and did not account for plaintiffs' large statistical deviations. 832 F.2d at 1432-34. None of the theories, hypotheses, data, computations, or expert opinions of the appellate court which formed the basis for its reversal of the trial court were ever at issue at trial or at any stage of the appeal until the appellate court's opinion was issued. A hypothesis is presented in argument in this case that the appellate court may not be as well qualified as a statistical expert as suggested in its opinion because its studies may well be as fatally flawed as plaintiffs' statistical analysis.

The appellate court, recognizing that both its legal and factual analysis of the statistical evidence could be wrong, gratutiously finds, "Just in case the evidence was sufficient to satisfy the [defendant's] burden of production, we add that the explanation [the distance factor] was pretextual." 832 F.2d at 1435. The appellate court did not mention, let alone analyze, the ICG statistical evidence or the employee testimony concern-

ing the distance policy and its justification in the context of pretext. Its only stated reason for rejecting the trial court's finding of no pretext was that it found the ICG's explantion *unlikely*. 832 F.2d at 1435. The trial court specifically found no pretext. 639 F.Supp. at 1579. At issue is whether the appellate court's finding meets the clearly erroneous standard of review or constitutes a mere disagreement with the result reached in the trial court.

Finally, the appellate court, at the end of its opinion, recites data, theories, and opinions that cross into at least four areas of expertise including labor economics, statistics, sociology, and psychology. 832 F.2d at 1435-37. The validity of these new factual bases for entering judgment for plaintiffs was never tested in the trial court since none of this academic analysis was ever presented as evidence at trial.

ICG filed a petition for rehearing en banc. The ICG attempted to respond to the appellate court's new and untried factual assertions. It pointed out several trial exhibits and witness testimony about the non-uniform distribution of ICG's job applicants by race. The ICG also pointed out the fallacies in the appellate court's new untried theoretical assumptions concerning the appropriate statistical tests to be performed in this case. The ICG requested that the appellate court set aside its opinion and reinstate the district court's judgment, or in the alternative, that it grant a new trial on the numerous new factual issues presented for the first time in its appellate opinion. The appellate court denied the petition for rehearing en banc without explanation. This left intact the appellate court's extraordinary judicial procedure of serving as an independent statistical expert in this case.

REASONS FOR GRANTING THE WRIT

This case involves a flagrant abuse by a circuit court of appeals of its mandated role in reviewing the findings of a district court in a non-jury case. The decision of the United States Court of Appeals for the Seventh Circuit is in complete conflict with the clearly erroneous standard review in Fed.R.Civ.P. 52(a) and this court's most recent decision defining and applying this standard in an employment discrimination case. *Anderson v. City of Bessemer City,* 470 U.S. 564 (1985). The appellate court has so far departed from the appropriate standard that this court must exercise its supervisory authority to reverse the appellate court's decision and reinstate the trial court's judgment. Sup. Ct. Rule 17.1(a).

This case also involves a significant change by the appellate court of the law pertaining to a defendant's burden or level of response to a plaintiff class' prima facie pattern or practice disparate treatment case. The appellate court's redefinition of the defendant's burden of production is in conflict with *Texas Department of Community Affairs v. Burdine,* 450 U.S. 248 (1981). The appellate court specifically critized *Burdine's* allocation of burdens in a pattern or practice case and it required ICG to prove rather than articulate a nondiscriminatory reason for the disparities in plaintiffs' statistics. In other words, placed the burden on defendant to prove it did not discriminate.

I. The Appellate Court Failed To Apply The Clearly Erroneous Standard of Review Mandated by Fed.R.Civ.P. 52(A) To The District Court's Finding Of Fact.

The appellate court acted with utter indifference to the clearly erroneous standard of review mandated in Fed.R.Civ.P. 52(a) and this court's decision in *Anderson v. City of Bessemer City,* 470 U.S. 564 (1985). In essence, the appellate court disagreed with the trial court and found "that discrimination was [ICG's] standard operating procedure — the regular rather than the unusual practice." *International Bhd. of Teamsters v. United*

States, 431 U.S. 324, 336 (1977). The appellate court agreed with the district court that the issue of proper labor market designation was the central issue in the case. *Mister v. Illinois Cent. G. R.R.*, 832 F.2d 1427 (7th Cir. 1987). However, the appellate court rejected the trial court's specific finding that defendant's St. Louis Division contained many individual labor markets and that the failure of plaintiffs to account for these individual labor markets created an adequate rebuttal of any inference of discrimination from plaintiffs' statistics. Based upon its cursory reveiw of the record, the appellate court rejected this finding of the district court because it thought defendant had failed to show that the geographic distribution of applicants by race was uneven. 832 F.2d at 1430.

The district court specifically found that distribution of applicants by race was uneven. *Mister v. Illinois Cent. G. R.R.*, 639 F.Supp. 1560, 1579 (S.D. Ill. 1986), *aff'd in part, rev'd in part*, 832 F.2d 1427 (7th Cir. 1987) (court found defendant was hiring for job locations in "predominately white areas"). Not only was this finding plausible in light of the entire record, but it is the only finding that makes sense. The applications themselves established applicants were not uniformly distributed. (Defendant's Exhibit No. 2). Approximately 45% of the applicants came from St. Clair County and Jackson County, Illinois, counties with high black populations. (Defendant's Exhibit No. 7 and 52). The U.S. Census data in evidence showed some counties had no blacks in their diminished civilian labor force and, obviously, all applicants from these counties must have been whites. (See Defendant's Exhibit No. 4, DCLFALLF, pp. 19-21, Douglas, Effingham, Greene, Hamilton, Hardin, Jasper, Mason, Monroe, Pike, Livingston (Ky), Marshall (Ky) Counties had no blacks in the civilian labor force). Many counties in the St. Louis Division had less than 1% blacks. (See Defendant's Exhibit No. 4, DCLFALLF, pp. 19-21).

One observation by the court of appeals regarding proof of uneven distribution must be highlighted. It emphasizes exactly

why courts of appeal are required to apply the clearly erroneous standard of review and leave the factfinding mission to the trial court. The court of appeals indicated that the ICG had a "straightforward" method to prove non-homogeneous distribution of applicants. 832 F.2d at 1432. The court stated:

> The ICG could have measured the distance between the residences of 'active' applicants (those who applied within six months) and the places for which it was hiring at a given moment. If the data showed that it hired the applicants who lived close by, without regard to race . . . it would have had a good reply to the plaintiffs' case. But the ICG did not conduct this inquiry.

832 F.2d at 1432. All of the available applications for employment were admitted into evidence. (Defendant's Exhibit No. 2). The analysis suggested by the appellate court could not be performed because *no racial information* was requested on defendant's applications. (Defendant's Exhibit No. 2). None of the monthly employment hiring records used by plaintiffs' expert contained names or addresses of residence of the applicants. (Plaintiffs' Exhibit Nos. 22-33). It was *impossible* to prove non-uniform racial distribution of applicants for jobs as so glibly suggested by the court of appeals (and, as the court later noted, "Courts ought not demand that employers do the impossible . . .," 832 F.2d at 1437). This fact also refutes the court of appeals' conclusion that defendant's demographic analysis could never overcome plaintiff's applicant flow analysis. 832 F.2d at 1435. A meaningful applicant flow analysis could not be performed.

As if its incompetent *de novo* review of the evidence was not enough, the appellate court performed its own statistical analysis regarding the ICG's articulated defense. 832 F.2d at 1432-34.

The appellate court argued that the defendant could have proven its defense by showing that the mean distance from

worksites of blacks and whites at their times of hire was equal. 832 F.2d at 1432. It then concocted its own test to "prove" ICG's defense was invalid. 832 F.2d at 1432-33. Neither the hypothesis nor the calculations were presented by the plaintiffs to the trial court. If the plaintiffs had done so, cross-examination and rebuttal evidence would have uncovered the fundamental flaw in the analysis — the hypothesis that the mean distances should be equal for a non-discriminating employer is incorrect. Black and white applicants were not geographically homogeneous. The East St. Louis worksite, for example, is located in St. Clair County, Illinois, in which 22.1% of the diminished civilian labor force are blacks. (Defendant's Exhibit 4, DCLFALLF, p. 19). The adjacent counties in Illinois are Madison (5.2% blacks), Clinton (.4% blacks), Washington (.1% blacks), Randolph (2.1% blacks) and Monroe (0% blacks). (Defendant's Exhibit No. 4, DCLFALLF, p. 19). A non-discriminating East St. Louis employer would find that the average distance from work of the blacks it hires is less than that of the whites because people hired from the outlying regions, being racially representative of their regions, would tend to be whites while those hired from close in would tend to be blacks.

Adversary proceedings before the trial court would have also exposed the fact that at East St. Louis, the defendant hired people from closer to the worksite than at rural worksites such as Centralia in south central Illinois and Thompsonville in far southern Illinois. (Defendant's Exhibit No. 14). Urban areas such as East St. Lous had higher populations and thus there was no need generally to hire outside the immediate area. Very few blacks live in rural areas, so residents both near and far from rural worksites tend to be whites. (Defendant's Exhibit No. 7). This fact would further increase the disparity between blacks' and whites' mean distance from work.

If the appellate Court required additional factual findings pertaining to defendant's statistical evidence to enable it to review the case, it should have remanded the case to the district court

rather than make new factual findings of its own. *Icicle Seafoods, Inc. v. Worthington,* 475 U.S. 709, 106 S.Ct. 1527, 1530 (1986).

Based entirely on its review of the statistical evidence before the district court and statistical evidence which the appellate court created, the appellate court reversed the district court's finding that distance accounted for the disparity in plaintiff's statistics. This decision is unfathomable in light of prior *and subsequent* seventh circuit precedent. " '[W]here statistical evidence is involved, great deference is due the district court's determination of whether the resultant numbers are sufficiently probative of the ultimate fact in issue.' " *EEOC v. Sears, Roebuck & Co.,* No. 86-1519, p. ____ (7th Cir. January 14, 1988) (*quoting Soria v. Ozinga Bros., Inc.,* 704 F.2d 990, 994 n. 6 (7th Cir. 1983)). *See also, Griffin v. Board of Regents of Regency Univ's,* 795 F.2d 1281, 1289-90 (7th Cir. 1986). In *Soria,* the court *wholly deferred* to the district court's assessment of the credibility of expert and lay witnesses since contradictory statistical and anecdotal evidence was proferred. 704 F.2d at 994 n. 6. The same appellate court did exactly the opposite in this case. Not only was evidence reviewed *de novo* and reweighed on questions of credibility and reliability, but it was created for the first time on appeal.

The courts of appeals decision is even more tenuous when it is recognized that the district court based its findings [illegible] on nonstatistical evidence. In fact, after finding that the ICG used a distance factor in its hiring decisions and that the use of a distance factor was justified, the district court felt compelled to note that it as not deciding these issues *solely* on nonstatistical evidence but also on statistical evidence. 639 F.Supp. 1579. Since the district court's findings are based upon its weighing of the credibility of ICG's employees witnesses concerning the distance factor and its business justification, those findings are to be given even greater deference. *Anderson,* 470 U.S. at 575.

The result-oriented mindset of the appellate court is further revealed in its *dicta*. After deciding defendant failed to met its burden of production, the court stated: "Just in case the evidence was sufficient to satisfy the burden of production, we add that the explanation was pretextual." 832 F.2d at 1435. This conclusion was based on the court's incredible statement that it was "*not likely*" that the defendant believed distance accounted for the disparity in plaintiffs' statistics. 832 F.2d at 1435 (emphasis added). This is a direct example of the appellate court's *de novo* reworking of the weight given to the testimony and evidence by the trial court. After hearing the testimony of numerous employees and evaluating the statistical analyses, the district court found the ICG's explanation was not pretextual, 639 F.Supp. at 1579, and its finding should not be disturbed because the appellate court deems it *unlikely*. *Anderson,* 470 U.S. at 574-75.

The court of appeals' statements regarding pretext in *Mister* are even more perplexing when it is recognized that prior to this decision, the seventh circuit held that a district court's finding regarding pretext is "all but conclusive" and can almost never by questioned by an appellate court. *Benzies v. Illinois Dep't of Mental Health & Developmental Disabilities,* 810 F.2d 146, 147 -48 (7th Cir.) *cert. denied,* ____ U.S. ____, 107 S.Ct. 3231 (1987). The court reversed simply because it would have decided the pretext issue differently. This has never before been sufficient, *Benzies,* 810 F.2d at 147-48, and it cannot be sufficient now.

The defendant used the only reasonable method and data available in this case to test its hiring practices: a demographic analysis comparing actual hires and local markets to census availability data in those markets. Those detailed, extensive demographic studies showed conclusively that the ICG hired on a race neutral basis at all of its job sites whether urban or rural and in close proportion to the relative racial availabilities in those areas. ICG presented extensive uncontradicted testimony

concerning its St. Louis Division's efforts to assure fair and proportional representation of all races in its work force. It provided clear and convincing testimony adopted by the district court that its local hiring practice, the application of a distance factor in its hiring decisions, was a clearly justified business necessity. In order to produce the result it sought, the appellate court chose to disregard the most fundamental fact in this case: ICG hires in local labor markets. In a hypertechnical, confused and wrong application of the principles of allocation of burdens of proof in this type of case and in untested recitations of academic theories, the appellate court treats as proven an incredible and unrealistic version of the facts in this case: that ICG hired from one large labor market in which the races were homogeneously distributed. Based on this unbelievable premise, the appellate court concluded that discrimination was ICG's "standard operating procedure. . . ." *International Bhd. of Teamsters v. United States,* 431 U.S. 324, 336 (1977). The overwhelming weight of the evidence establishes that this conclusion is nonsensical.

The district court recognized the plaintiff's minimal showing of a prima facie case. 639 F.Supp. at 1576. It also recognized the strong second view of the case presented by ICG concerning local labor markets without discrimination. 639 F.Supp. at 1579. Based on all the evidence, statistical and non-statistical, the district court credited a view of the case supported by ICG's evidence. 639 F.Supp. at 1579. In weighing the two possible views of the case, the court fulfilled its role as the trier of fact. Had the court of appeals been sitting as a trier of fact, it may have decided for the plaintiff class. The reversal in this case, however, does violence to the clearly erroneous standard of review contained in Fed.R.Civ.P. 52(a). "Where there are two permissible views of the evidence, the fact finder's choice between them cannot be clearly erroneous." *Anderson,* 470 U.S. at 574. If the district court's findings are "*plausible*," the court of appeals may not reverse "even though convinced that had it been sitting as a trier of fact, it would have weighed the evidence

differently." *Anderson*, 470 U.S. at 573-74. The court of appeals became a trier of fact in this case, and this court must reverse the appellate decision and reaffirm Fed.R.Civ.P. 52(a) and the clearly erroneous standard of review. Failure to reverse the appellate court would permit unchecked and unbridled discretion on the part of the appellate court in this type of case. The appellate court opinion constitutes an invasion of the jurisdiction of the district court and a violation of its own jurisdictional responsibilities (28 U.S.C. §1291).

The appellate court's utter disregard for the evidence presented to the trial court, its disregard of the trial court's findings of fact, its failure to weigh the evidence in light of the trial court's findings of fact, and its presentation of wholly untested and unverified statistical theories and studies is an extraordinary example of an appellate court run amok and evidences an extreme departure from the accepted and usual course of judicial proceedings. Petitioner prays that the petition for writ of certiorari be granted and that the appellate court be summarily reversed in conformity with Sup. Ct. Rule 23.1 and *County of Los Angeles v. Kling*, 474 U.S. 936 (1985). *See also Dennison Mfg. Co. v. Panduit Corp.*, 475 U.S. 809 (1986).

II. The Appellate Court Improperly Imposed On Defendant A Burden Of Persuasion Rather Than Production In Rebutting Plaintiffs' Prima Facie Disparate Treatment In Hiring Case, Thereby Placing The Burden On Defendant To Prove It Did Not Intentionally Discriminate.

In *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981), the Supreme Court described the shifting burdens in a Title VII case. The plaintiff has the initial burden of establishing a prima facie case of disparate treatment. 450 U.S. at 253. This is not a difficult burden. 450 U.S. at 253. If plaintiff establishes a prima facie case, "[t]he burden that shifts to the defendant . . . is to rebut the presumption of discrimination by producing evidence that the plaintiff was rejected, or someone else was preferred, for a legitimate, nondiscriminatory

reason." 450 U.S. at 254. The purpose of placing the burden of production on defendant is to meet the plaintiff's prima facie case by presenting a legitimate reason for the action and to frame the issues with sufficient clarity so that the plaintiff will have a "full and fair opportunity to demonstrate pretext." 450 U.S. at 255-56. The burden to prove intentional discrimination remains on plaintiff throughout the litigation. *United States Postal Serv. Bd. of Governors v. Aikens,* 460 U.S. 711 (1983).

In *Burdine,* plaintiff argued that the analysis adopted by the court would unduly burden plaintiffs because employers could compose fictitious, albeit legitimate, reasons for the hiring decision. 450 U.S. at 257-58. The court rejected this argument, since it found that other safeguards provided for in its burden shifting model would sufficiently enable plaintiff to show that the defendant's articulated reason was pretextual. 450 U.S. at 258. *Burdine* allows the defendant to satisfy his burden of production by offering an untrue reason for its hiring decision. *Tye v. Board of Educ. of the Polaris Joint Vocational School Dist.*, 811 F.2d. 315, 319 (6th Cir.) *cert. denied,* ____ U.S. ____, 108 S.Ct. 285 (1987).

The trial court imposed the correct allocation of burdens of proof and production in this case. It held the plaintiff to its continuing burden to prove intentional hiring discrimination at all stages of the trial. It clearly recognized and adopted a burden of articulation or production in the defense response to a prima facie case. ICG met its burden of production by showing plaintiff's statistics were inadaquate for failing to test for local labor markets, *Griffin v. Board of Regents of Regency Univ's*, 795 F.2d 1281, 1289-92 (7th Cir. 1986); *Coates v. Johnson & Johnson*, 756 F.2d 524 (7th Cir. 1985), and by providing unrefuted evidence of its policy and practice of applying a distance factor in its hiring decisions. ICG also produced copious evidence of a business necessity for its practice of local hiring.

The appellate court placed the far more onerous and improper burden of persuasion on ICG, thus requiring ICG to

prove that it did not intentionally discriminate against plaintiffs. The court stated that "[t]he essential ingredient of the ICG's case was *proof* that black applicants did live farther from the worksites, *enough so to account for the different rates of hiring.*" *Mister v. Illinois Cent. G. R.R.*, 832 F.2d at 1432 (emphasis added). The court then held that "defendants' [sic] statistical work simply does not show that distance accounts for the racial differences in the rate of hiring." 832 F.2d at 1434.

The appellate court required defendant to prove, not merely articulate, that the distance factor accounted for the disparity in plaintiff's statistics. Since the appellate court believed that distance was not the "true" reason for ICG's hiring decisions, it held that defendant failed to carry its burden of production. 832 F.2d at 1434. This conclusion is contrary to the lower standard of production mandated by *Burdine*.

Requiring defendant to produce evidence that a nondiscriminatory reason "accounts for" a hiring decision in effect places a burden of persuasion on the defendant to prove that it did not intentionally discriminate against plaintiffs, contrary to this court's decision in *Aikens*. Placing such a burden on defendant is especially improper due to the relatively low burden placed on plaintiff to establish a prima facie case. The intent of the *Burdine* model is simply to allow plaintiff to have the issues formulated so that plaintiff is given a full and fair opportunity to prove pretext. In a statistical case, defendant's burden should be especially slight, since plaintiff is given the opportunity to prove pretext merely by including distance as a tested variable in its statistical model. Plaintiff need not account for all possible nondiscriminatory motivations in its statistics, simply those proffered by defendant in meeting its burden of production.

The misallocation by the appellate court of the appropriate burden of rebuttal permits reversal if the appellate court's finding that the defendant's distance factor was pretextual was improper. *Burdine*. Plaintiffs offered no proof to demonstrate

pretext. Plaintiffs failed to obtain testimony from ICG employees that the distance factor was falsely concocted after EEOC charges were filed. Plaintiffs rebuttal expert only criticized defendants demographic analysis and never performed any analysis to show the distance factor was pretextual. The district court found the articulated reason of distance was not pretextual. *Mister v. Illinois Cent. G. R.R.*, 639 F.Supp. 1560, 1579 (S.D. Ill. 1986), *aff'd in part, rev'd in part,* 832 F.2d 1427 (7th Cir. 1987). Since the appellate court reversed the district court's finding on pretext without reference to any evidence, its findings on pretext were clearly speculative and improper thus permitting outright reversal of its decision for the misallocation of burdens.

The appellate court opinion is in clear conflict with the decisions of this court in *Burdine* and *Aikens*. This court should reassert the *Burdine* model by reversing the appellate court decision.

CONCLUSION

The petitioner, ICG, respectfully prays for summary reversal of the appellate court decision in this case. Granting of this petition for writ of certiorari and summary reversal would reimpose the proper standard of appellate review in the circuit courts of appeals required by Federal Rule of Civil Procedure 52(a). A reversal could materially assist in conserving the time and resources of reviewing courts. In the alternative, petitioner prays that the court grant this writ of certiorari for the purpose of remanding this case to the United States District Court for the Southern District of Illinois for a new trial for the purpose of allowing the defendant to respond to the new factual issues raised for the first time on review by the appellate court.

Respectfully submitted,

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APPENDIX

APPENDIX A

Robert Earl MISTER, on behalf of himself and all others similarly situated, Plaintiffs,

v.

ILLINOIS CENTRAL GULF RAILROAD COMPANY, a corporation, Defendant.

Civ. No. 81-3006.

United States District Court,
S.D. Illinois,
East St. Louis Division.

Aug. 7, 1986.

Class of black applicants for unskilled railroad laborer positions brought civil rights suit against employer alleging discriminatory hiring practices. The District Court, Foreman, Chief Judge, held that: (1) prima facie case of disparate treatment or disparate impact had been established; (2) employer rebutted prima facie case by showing that distance from workplace and practice of local hiring accounted for differences indicated by applicant flow analysis; (3) despite shortcomings, class representative adequately represented class; and (4) class representative had failed to establish prima facie case of discrimination due to his misstatement on job application and poor work history.

Judgment for employer.

1. Civil Rights key 9.10

Relevant time frame for ascertaining labor market for purpose of class action alleging racial discrimination in private employment arising in Illinois was five-year period prior to filing of lawsuit. 42 U.S.C.A. § 1981.

2. Civil Rights key 44(1)

Class of black individuals, who were denied jobs with employer, alleging racial discrimination in hiring practices, established prima facie case of disparate treatment or disparate impact on basis of applicant flow analysis which showed that there existed statistically significant differences in number of blacks who applied for jobs and those who were hired despite random inaccuracies in statistical evidence generated by expert. Civil Rights Act of 1964, §§ 701 et seq., 703(a)(1), 706(f), as amended, 42 U.S.C.A. §§ 2000e et seq., 2000e-2(a)(1), 2000e—5(f)(3); 42 U.S.C.A. §§ 1981, 1985; Fed.Rules Civ. Proc.Rule 52(a), 28 U.S.C.A.; 28 U.S.C.A. §§ 1343, 1391.

3. Civil Rights key 44(1)

Employer successfully rebutted prima facie case of disparate treatment and disparate impact, made by class of black individuals denied employment, through applicant flow analysis, by showing that distance from workplace and practice of local hiring accounted for differences indicated, absent showing that employer used local hiring practice as pretext for discrimination. Civil Rights Act of 1964, §§ 701 et seq., 703(a)(1, 706(f), as amended, 42 U.S.C.A. §§ 2000e et seq., 2000e—2(a)(1), 2000e—5(f)(3); 42 U.S.C.A. §§ 1981, 1985; Fed. Rules Civ.Proc.Rule 52(a), 28 U.S.C.A.; 28 U.S.C.A. §§ 1343, 1391.

4. Federal Civil Procedure key 184.10

Representative of class of black applicants denied employment was active and adequate representative of class despite his having lied on application for employment, failure to report income on tax returns, use of marijuana, and having been male prostitute where class counsel did "admirable job" in representing class claims.

5. Civil Rights key 44(1)

Black applicant for unskilled railroad laborer position failed to establish prima facie case of race discrimination in employ-

ment after claims of class which he represented failed, thus negating any presumption that employer had unlawfully discriminated against individual, in light of applicant's misstatement on application and poor work history, despite employer's not knowing of misstatement. Civil Rights Act of 1964, § 701 et seq., as amended, 42 U.S.C.A. § 2000e et seq.; 42 U.S.C.A. §§ 1981, 1985.

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MEMORANDUM AND ORDER

FOREMAN, Chief Judge:

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I. INTRODUCTION

The plaintiff, Robert Earl Mister, a black male, filed this action on January 9, 1981, against the Illinois Central Gulf Railroad Company, pursuant to Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq. (Title VII), 42 U.S.C. § 1981, and 42 U.S.C. § 1985, alleging that the defendant refused to hire him because of his race. In addition to the individual claim, and upon the plaintiff's request, the Court allowed the plaintiff to represent a class of all black persons who had applied for jobs and been wrongfully rejected due to the defendant's allegedly racially discriminatory practices with regard to hiring within the defendant's St. Louis, Missouri, Operating Division. On October 11, 1985, the Court granted the defendant's motion for summary judgment with respect to the plaintiffs' 42 U.S.C. § 1985 claims.

After numerous discovery battles that caused many continuances, the Court, without a jury, heard the liability phase of the case on November 12, 13, 14, 15, 18, 19, 20, 21, 1985, December 5, 6, 1985 and January 21, 22, 23, 24, 30, 31, 1986. The following memorandum represents this Court's findings of fact and conclusions of law as contemplated by Fed.R.Civ.P. 52(a). In order to place the discussion of the evidence in the proper perspective, the Court feels that a general overview of the legal standards is appropriate.

II. LEGAL FRAMEWORK

A. Jurisdiction

This Court finds that it has subject matter jurisdiction of the Title VII claims pursuant to 42 U.S.C. § 2000e—5(f)(3) and that it has subject matter jurisdiction of the 42 U.S.C. § 1981 claims pursuant to 28 U.S.C. § 1343. Venue is proper both under 42 U.S.C. § 2000e—5(f)(3) and 28 U.S.C. § 1391.

B. Title VII.

Title VII prohibits an employer from failing or refusing to hire an individual because of the individual's race. 42 U.S.C. § 2000e—2(a)(1). The Supreme Court has identified two theories in Title VII cases—disparate treatment and disparate impact. *International Brotherhood of Teamsters v. United States,* 431 U.S. 324, 97 S.Ct. 1843, 52 L.Ed.2d 396 (1977). In general, either theory may be applicable to a particular set of facts. *Id.* at 335 n. 15, 97 S.Ct. at 1854. *Regner v. City of Chicago,* 789 F.2d 534 (7th Cir.1986).

Under the disparate treatment theory, the employer treats some people less favorably than others because of their race, religion, sex, or national origin. *Teamsters* 431 U.S. at 335 n. 15, 97 S.Ct. at 1854 n. 15. Proof of discriminatory intent is critical. *Id.* Under the disparate impact theory, employment practices that are facially neutral in their treatment of different groups "fall more harshly on one group than another and cannot be justified by business necessity. . . ." *Id.* Unlike a disparate treatment case, a plaintiff in a disparate impact case need not show an intent to discriminate. *Id.*

1. An Individual Disparate Treatment Claim.

McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973), is the seminal case concerning the burdens of pleading and proof in an individual disparate treatment case. The Supreme Court therein outlined a three-step formula for such cases. First, the plaintiff must establish a prima facie case. He may do so by showing that a) he belongs to a protected class; b) that he applied for an existing job for which he was qualified; c) that despite his qualifications, he was rejected; and d) after the rejection, the employer continued to seek applicants with the plaintiff's qualifications. *Id.* at 802, 93 S.Ct. at 1824. Once the plaintiff establishes a prima facie case, the burden shifts to the defendant to provide a legitimate non-

discriminatory reason for its actions. *Id.* The purpose of this evidence is to show that the employment decision was not "motivated by discriminatory animus." *Texas Department of Community Affairs v. Burdine,* 450 U.S. 248, 257, 101 S.Ct. 1089, 1095, 67 L.Ed.2d 207 (1981). The defendant need not demonstrate nondiscriminatory intent, but must simply produce evidence to rebut the presumption of discrimination raised by the plaintiff's prima facie case. *Id.* at 254-55, 101 S.Ct. at 1094. This is not a burden of persuasion, but merely a burden of production. The plaintiff may still persuade the Court that the defendant's explanation is "unworthy of credence" that "a discriminatory reason more likely motivated" the defendant. *Id.* at 256, 101 S.Ct. at 1095. The plaintiff at all times retains the ultimate burden of persuasion.

The *McDonnell Douglas* formulation was not "intended to be rigid, mechanized, or ritualistic" in application. *Furnco Construction Corp. v. Waters,* 438 U.S. 567, 577, 98 S.Ct. 2943, 2949, 57 L.Ed.2d 957 (1978). Nor does it suggest a specific order of proof at trial. *Coates v. Johnson & Johnson,* 756 F.2d 524, 531 n. 5 (7th Cir. 1985). The ultimate question in a disparate treatment case is whether the defendant's actions were founded in a discriminatory intent. *Teamsters,* 431 U.S. at 335 n. 15, 97 S.Ct. at 1854 n. 15.

2. A Disparate Impact Claim.

In a disparate impact case, the plaintiff can establish a prima facie case of discrimination by showing that "facially neutral standards in question select applicants for hire in a significantly discriminatory pattern." *Dothard v. Rawlinson,* 433 U.S. 321, 329, 97 S.Ct. 2720, 2726, 53 L.Ed.2d 786 (1977).

Once the plaintiff establishes a prima facie case of discriminatory impact, the burden of proof shifts to the defendant to demonstrate a business necessity for the practice or that the practice has a "manifest relation to the employment in question" in order to avoid a finding of discrimination. *See Griggs*

v. Duke Power Co., 401 U.S. 424, 431, 91 S.Ct. 849, 853, 28 L.Ed.2d 158 (1971), and *Connecticut v. Teal*, 457 U.S. 440, 446, 102 S.Ct. 2525, 2530, 73 L.Ed.2d 130 (1982). The Supreme Court has not indicated whether this shift in burden is one of persuasion or simply one of coming forward with the evidence as in a disparate treatment case. *See* Schlei and Grossman, *Employment Discrimination Law*, p. 1328 (2d ed. 1983). This Court is inclined to follow those cases holding that he shift is one of persuasion. *See Johnson v. Uncle Ben's Inc.*, 657 F.2d 750, 752-53 (5th Cir.1981), *cert. denied*, 459 U.S. 967, 103 S.Ct. 293, 74 L.Ed.2d 277 (1982). Even if the defendant meets his burden of persuasion, the plaintiff may still prevail by showing that the defendant was using the practice as a mere pretext for discrimination or that other selection devices without a significant discriminatory effect would also "serve the employer's legitimate interest. . . ." *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 425, 95 S.Ct. 2362, 2375, 45 L.Ed.2d 280 (1975).

Similar to a disparate treatment case, the allocation of proof set forth above represents a method for analyzing evidence and not a procedure by which evidence is presented. *Teamsters*, 431 U.S. at 335 n. 15, 97 S.Ct. at 1854 n. 15.

A disparate impact theory is most frequently employed in class actions because the employment practice in question, by the very nature of the theory, must affect a large group of persons. Statistics are almost totally determinative in cases under the disparate impact theory.

Generally, a disparate impact claim concerns the impact of a facially neutral standards or criteria such as a maximum height requirement, or minimum scores on an objective test. *See e.g., Griggs v. Duke Power Co.*, 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158 (1972). Courts are not in agreement as to whether the disparate impact analysis can be applied to subjective employment decisions. *See* Schlei and Grossman, *Employment Discrimination Law*, p. 24 (1983-1984 cumulative supplement); *Major Issues in the Federal Law of Employment Discrimina-*

tion, Supplement 1 p. 13. This Court need not get too caught up in this interesting debate because in the recent case of *Regner v. City of Chicago,* 789 F.2d 534, (7th Cir.1986), the Seventh Circuit has seemingly approved the application of the disparate impact model to a subjective procedure. *See also Griffin v. Board of Regents of Regency Universities,* 795 F.2d 1281, 1287-1289, nn. 13, 14 (7th Cir.1986). For an excellent discussion of this issue, see Lamber, *Discretionary Decisionmaking: The Application of Title VII's Disparate Impact Theory,* 1985 U.Ill.L.R. 869.

3. A Class Action Pattern and Practice Disparate Treatment Claim.

Although the disparate treatment theory arises most often in an individual case, class actions may also proceed under this theory. In such a case, the plaintiff generally combines a claim of individual disparate treatment with a claim that the defendant's treatment of the plaintiff is part of a pattern or practice of discriminatory treatment toward the members of the plaintiff's class.

Plaintiffs who raise a pattern or practice claim must demonstrate that the discrimination has been the regular policy of the defendant, i.e., that "discrimination was the company's standard operating procedure—the regular rather than unusual practice." *International Brotherhood of Teamsters v. United States,* 431 U.S. 324, 336, 360, 97 S.Ct. 1843, 1867, 52 L.Ed.2d 396 (1977). The plaintiff usually establishes a prima facie case by employing statistical evidence to create an inference of classwide discrimination similar to a disparate impact case. *Id.* at 339, 97 S.Ct. at 1856. Although the plaintiffs almost always offer evidence of individual instances of discrimination treatment to buttress their case, the plaintiffs are not required to show that each member of the class is a victim of the defendant's discriminatory policy. *Id.* at 360, 97 S.Ct. at 1867. Evidence of isolated incidents alone will not establish a prima

facie case. However, in some cases, statistical evidence alone may constitute a prima facie case. *See Coates v. Johnson & Johnson,* 756 F.2d 524, 532 n. 6 (7th Cir.1985).

Once the plaintiffs establish a prima facie case, the burden then shifts to the defendant to rebut the inference of discrimination created by the plaintiff's statistics. The defendant may do so by "demonstrating that the plaintiffs' proof is either inaccurate or insignificant." *Teamsters,* 431 U.S. at 360, 97 S.Ct. at 1867, or by providing a "nondiscriminatory explanation for the apparently discriminatory result." *Id.* at 360 n. 46, 97 S.Ct. at 18678 n. 46. At all times, the plaintiffs maintain the burden of persuasion with respect to discrimination. *Coates,* 756 F.2d at 532.

C. A 42 U.S.C. § 1981 Claim.

42 U.S.C. § 1981 provides a redress for racial discrimination in private employment. *McDonald v. Santa Fe Trail Transportation Co.,* 427 U.S. 273, 96 S.Ct. 2574, 49 L.Ed.2d 493 (1976). Traditionally, the courts regarded Title VII and § 1981 cases as involving analogous principles, standards, and theories of discrimination; however, the Supreme Court has eliminated the disparate impact theory in § 1981 cases. *General Building Contractors Association v. Pennsylvania,* 458 U.S. 375, 102 S.Ct. 3141, 73 L.Ed.2d 835 (1982). In *General Building,* the Supreme Court held that § 1981 could only be violated by *purposeful* discrimination. Therefore, the legal standards outlined above for the individual and class disparate treatment claims would apply equally as well to the 42 U.S.C. § 1981 individual and class claims.

D. Statistical Evidence.

Obvious from the above discussion is that statistics play a dominant role in both disparate impact cases and disparate treatment pattern or practice cases. The two principal statistical comparisons are referred to as "pass/fail" and "popula-

tion/work force" comparisons. Schlei and Grossman, *Employment Discrimination Law*, pp. 1332-1358 (2d ed. 1983). In a hiring case such as this, the pass/fail statistics compare the percentage of the protected group (blacks) who meet a given employment requirement or who are actually hired with the corresponding percentage for the majority group (whites). Population/work force statistics in a hiring case compare the availability of the protected group (blacks) in the relevant labor market with the percentage of the protected group in the employer's work force.

The differences resulting from the above comparisons may be measured in a number of ways. The chief barometer employed is a standard deviation.

> The "standard deviation" is a number that quantifies the degree to which disparities spread out above and below the mean of distribution, thus describing the probability that chance is responsible for any difference between an expected outcome and the observed outcome in a sample consisting of two groups (a binomial distribution). The greater the number of standard deviations, the less likely it is that chance is the cause of any difference between the expected and observed results. The Supreme Court noted in *Castaneda v. Partida*, 430 U.S. 482, 97 S.Ct. 1272, 51 L.Ed.2d 498 (1977), that under a "two-tail" test of statistical significance, "[a]s a general rule for ... large samples, if the difference between the expected value and the observed number is greater than two or three standard deviations, then the hypothesis that the [disparity] was a random would be suspect to a social scientist." *Id.* at 497 n. 17, 97 S.Ct. at 1281 n. 17. The general rule should be applied with caution, however, and its particular applicability may vary from case to case. See D. Baldus & J. Cole, Statistical Proof of Discrimination § 9.03, at 293-97 (1980), 108-12 (Supp.1984); see also *American National Bank*, 652 F.2d [1176] at 1190-93.

Coates v. Johnson & Johnson, 756 F.2d 524, 536 n. 11 (7th Cir.1985).

The data used to furnish the components of each comparison can come from a number of sources. The employer's actual applicant flow is frequently used in pass/fail statistical comparisons and to determine the relevant labor market in a population/work force analysis. Schlei and Grossman, *Employment Discrimination Law,* pp. 1332-1358 (2d ed. 1983). General population census data or labor force data may also be utilized to determine the relevant labor market. In addition, work force composition data may be employed on the right side of the population/work force comparison.

[1] In ascertaining the relevant labor market, it is essential to define the proper geographic scope and time frame. In defining the geographic scope, the objective is to determine the area from which the employer's applicants are likely to come. With respect to the time frame, in a Title VII claim the relevant time frame is the period commencing 180 days prior to the filing of the EEOC charge. In the instant case, the relevant time frame is the period commencing on December 8, 1978. The relevant time frame for a 42 U.S.C. § 1981 claim is the period prior to the filing of the lawsuit that corresponds to the analogous state statute of limitations for the state in which the lawsuit is filed. In *Beard v. Robinson,* 563 F.2d 331, 334 (7th Cir.1977), *cert. denied sub nom., Mitchell v. Beard,* 438 U.S. 907, 98 S.Ct. 3125, 57 L.Ed.2d 1149 (1978), the Seventh Circuit held that all claims founded on the Civil Rights Acts were governed by the five-year Illinois statute of limitations for actions not covered in other statutes of limitations. Recently, however, in *Wilson v. Garcia,* 471 U.S. 261, 105 S.Ct. 1938, 85 L.Ed.2d 254 (1985), the Supreme Court held that the most analogous statute of limitations for 42 U.S.C. § 1983 claims is the state's personal injury statute of limitations. In Illinois, the personal injury statute of limitations is two years. Ill.Rev.Stat. ch. 110, ¶ 13-203. The defendant herein contends, therefore, that pur-

suant to *Wilson,* the relevant time frame for the § 1981 claims is two years from the date of the suit.

The Court disagrees. In *Anton v. Lehpamer,* 787 F.2d 1141 (7th Cir.1986), the Seventh Circuit indicated that *Wilson* would not be applied retroactively. Accordingly, the relevant time frame for the § 1981 claims is the five-year period prior to the filing of this lawsuit, or the period beginning on January 9, 1976.

Statistical proof pertaining to a time prior to the relevant time period may be admissible as circumstantial evidence of discrimination occurring within the relevant period. *Hazelwood School Dist. v. United States,* 433 U.S. 299, 309 n. 15, 97 S.Ct. 2736, 2742 n. 15, 53 L.Ed.2d 768 (1977). Statistical evidence covering the period after the filing of the lawsuit is irrelevant.

While most courts prefer time-frame statistics, static work force statistics are relevant especially if they demonstrate great disparity. Schlei and Grossman, *Employment Discrimination Law,* p. 1365 (2d ed. 1983).

III. THE CLASS CLAIMS

With this legal framework in mind, the Court turns to a discussion of the claims and an analysis of the evidence presented.

A. The Claims and Theories of the Parties.

At the outset, the court notes that there existed prior to trial and even at trial, confusion as to what theory upon which the plaintiffs were relying. The class plaintiffs claimed that this was both a disparate treatment and disparate impact case. The defendant agreed that this was a class disparate treatment case, although it disagreed with the plaintiffs as to what that meant, but argued that disparate impact analysis was inapplicable to this case because the plaintiffs could not point to any objective standard or test used to exclude blacks. The plaintiffs' response

to this latter argument was two-fold. First, the plaintiffs alleged that the defendant utilized a fifty-mile rule to exclude from consideration those applicants who resided outside of a fifty-mile radius from the job location. The plaintiffs argued that this rule, although neutral on its face, had a disparate impact when applied to black applicants. Second, and alternatively, the plaintiffs asserted that if there were no fifty-mile rule, then there existed excess subjectivity in the defendant's hiring process and such subjectivity had a disparate impact on black applicants.

The parties also disagreed as to meaning of a class action disparate treatment case and as to what evidence could be presented to support this theory. The defendant argued that the class claim was a pattern or practice claim consisting of only statistical evidence to demonstrate that the defendant engaged in a pattern or practice of discrimination over the relevant time frame. The plaintiffs seemed to approach the class claims as a number of individual disparate treatment claims, although the plaintiffs recognized that statistics played a major role.

The legal analysis outlined above should indicate how this Court viewed the case. First, either the disparate treatment or disparate impact theory may be applicable to a given set of facts. *Regner v. City of Chicago,* 789 F.2d 534 (7th Cir.1986). Therefore, the plaintiffs could properly approach this case arguing both theories.

Second, the Court has construed the class disparate treatment claims as claims alleging a pattern and practice of discrimination on the part of the defendant. The easiest and almost exclusive way for the plaintiffs to demonstrate a pattern and practice of discrimination is by introducing statistics that allow the Court to infer that the employer has a pattern or practice of discrimination. Anecdotal evidence of individual instances of discrimination is not necessary, but can be used to buttress the statistical evidence. *International Brotherhood of Teamsters v. United States,* 431 U.S. 324, 360 n. 46, 97 S.Ct. 1843, 1867 n. 46, 52 L.Ed.2d 396 (1977). A pattern and practice case is not

made by presenting a number of individual disparate treatment claims under the *McDonnell Douglas* framework. This Court would not have nor could not have certified the class if such were intended. The plaintiffs are still under the impression that individual claims can comprise a class disparate treatment action because they argue, in their proposed findings, that the Court should certify a subclass of those individuals that applied for work on March 27, 1979. Therefore, the Court's job with respect to the class action disparate treatment claims was to determine if the defendant engaged in a pattern or practice of discriminatory hiring during the relevant time frames. *See Coates v. Johnson & Johnson,* 756 F.2d 524, 532 (7th Cir.1985). The Court considered the statistical evidence first and foremost.

Finally, the Court agrees with the plaintiffs that this case can also be analyzed under the disparate impact theory. *See Regner v. City of Chicago,* 789 F.2d 534 (7th Cir.1986). As will be discussed more fully later, the plaintiffs have not convinced this Court that there existed a hard and fast fifty-mile rule. But, by the same token, they have convinced the Court that the defendant subjectively applied distance from the workplace in its hiring decisions.

It is important to note that a disparate treatment pattern and practice case and a disparate treatment excess subjectivity case are identical in terms of evidence. Schlei and Grossman, *Employment Discrimination Law,* p. 1288-1289 (2d ed. 1983).

> [I]n both the disparate treatment pattern-or-practice case and the adverse impact "excessive subjectivity" case, the battle is determined by an evaluation of the probative force of plaintiff's and defendant's statistical evidence and the evidence with respect to alleged specific instances of discrimination. The proof considerations are no different whether the case be styled a pattern or practice of disparate treatment, on the one hand, or adverse impact resulting from an excessively subjective system of selection for hire or promotion, on the other.

Id. at 1289-90 (footnotes omitted). The only important distinction is that in the excess subjectivity case the burden of persuasion would shift to the defendant after the plaintiffs establish a prima facie case.

B. An Overview of the the Evidence Presented.

In support of the class claims, the plaintiffs presented a statistical analysis of the defendant's hiring decisions over the relevant time frames along with anecdotal evidence. The statistical evidence consisted of an applicant flow analysis prepared by Dr. Leroy Grossman, a labor economist. His rather straight forward approach was to compare the percentage of black applicants for the defendant's St. Louis, Missouri operating division with the percentage of black hires. The statistical significance of the difference between these two percentages was computed by using a standard deviation analysis. Dr. Grossman's conclusion was that there existed a statistically significant difference in the percentage of blacks who applied and were hired.

The plaintiffs also presented static views of the defendant's work force for the years 1974 through 1983. Finally, the plaintiffs presented evidence of a number of blacks from the East St. Louis area who applied for jobs at the Carbondale, Illinois, office on March 27, 1979 and who were never hired despite other hirings in the division.

The defendant's evidence consisted of a three-fold attack on the plaintiffs' statistical evidence. First, the defendant presented evidence to demonstrate that the information Dr. Grossman relied upon to produce his applicant flow analysis was inaccurate. Second, the defendant presented a demographic analysis of the hiring decisions prepared by Dr. David Peterson, a statistician. This method compared the number of actual black hires at each work location during the relevant time frames to the expected number of black hires for each work location based upon the 1980 United States census

data. He also utilized a standard deviation analysis to compare the differences. His conclusion was that there was no evidence to suggest that the defendant's hiring decisions occurred on a basis other than random selection with regard to a hiree's race. Finally, the defendant presented evidence to demonstrate that distance from the workplace was an important factor in its hiring decisions.

In rebuttal, the plaintiffs presented the testimony of Dr. Marc Rosenblum, Chief Economist for the United States Equal Employment Opportunity Commission, who indicated the flaws he saw in Dr. Peterson's analysis.

C. The Plaintiffs' Evidence.

1. Statistical Analysis.

As indicated above, Dr. Grossman employed an applicant flow approach to analyze the defendant's hiring decisions. He testified that he decided to use this method because, in his opinion, applicant flow information, if available, provides the best method of measuring the employer's relevant labor market. Unlike a demographic method which relies on an estimate of the employer's labor market, the applicant flow method utilizes direct evidence of those actually interested in a job.

Dr. Grossman also decided to treat the entire St. Louis Operating Division as one labor market. His reasons for doing so were that historically the railroad industry attracts individuals from greater distances than other industries and because migration is a direct function of employment opportunity. He also added that the fact that the St. Louis Division had only one hiring officer and office supports his decision.

Dr. Grossman based his statistical analysis on three alternative sets of data furnished by the defendant. The three sources of data were 1) the defendant's Monthly Employment Activity Reports (MEARS); 2) the defendant's answer to supplemental interrogatory 4 which was based on the defendant's

1591 forms; and 3) the defendant's answer to interrogatory number 6.

The plaintiffs' statistics were summarized in Plaintiffs' Exhibit 73. Table No. 1 of Exhibit 73 is an applicant flow analysis using the applicant and hire data from the defendant's MEARS for the years 1979 and 1980. Dr. Grossman computed a Z-score or standard deviation comparing the percentage of whites hired out of the total number of white applicants to the percentage of blacks hired out of the total number of black applicants. In 1979, the percentage of black applicants hired was 10%, while the percentage of white applicants hired was 31.42%. In standard deviations, the number of blacks hired was 7.58 standard deviation units below the expected number. In 1980, 0% of black applicants were hired while 6.1% of the white applicants were hired. The number of black hires in 1980 fell 2.05 standard deviation units below the expected number. Grossman stated that to his knowledge, two standard deviation units is the customary cut-off point used by statisticians for statistical significance and that the Z-scores for both 1979 and 1980 were significant. Dr. Grossman indicated that the probability of the hiring disparity which occurred in 1979 having been due to chance alone is less than 29 out of 100,000,000.

Table No. 2 of Plaintiff's Exhibit 73 is an applicant flow analysis comparing applicants in the "laborer" and "no preference" categories with only hires in the laborer category. Dr. Grossman indicated that he made the common sense assumption that applicants who applied for "no preference" would be willing to accept a laborer job. In 1979, according to these figures, 11.0% of black applicants were hired and 39.4% of white applicants were hired. The actual number of blacks hired in 1979 according to these figures was 8.21 standard deviation units below the expected number. The probability that this was due to chance alone is less than 29 out of 100,000,000.

Table No. 3 of Plaintiffs' Exhibit 73 compares the total number of applicants in the "laborer" and "no preference"

categories with hires in the laborer, carmen apprentice, and switchman categories for the years 1979 and 1980. For 1979, 12.6% of black applicants were hired and 42.7% of white applicants were hired. The number of black hires under this comparison fell 8.35 standard deviation units below the expected number for 1979. Dr. Grossman stated that the Z-score was not statistically significant for 1980, O blacks were hired out of a total of 25 hires. Dr. Grossman pointed out, however, that this was to be expected as the likelihood of a statistically significant Z-score decreases in situations where relatively few hires are made.

Table No. 4 of Plaintiffs' Exhibit 73 is a comparison of applicants in the "laborer," "no preference," and "operative" categories with the hires in the laborer, carmen apprentice, and switchman categories. The data in this table, as well as Tables 1-3, was taken from the defendant's MEARS. For 1979, 10.1% of black applicants were hired while 33.7% of white applicants were hired. The actual hiring of blacks fell 7.87 standard deviation units below the expected number in 1979. Again Dr. Grossman testified that the probability of this having been due to chance alone is less than 29 out of 100,000,000.

Table No. 6 of Plaintiffs' Exhibit 73 is an applicant flow analysis comparing the number of applicants in all categories with the number of hires in all categories using as its data base defendant's answer to interrogatory number 6. Dr. Grossman indicated through this table that in each year 1977-1980 there is a statistically significant discrepancy between the number expected to be hired. More importantly, Dr. Grossman pointed out that the combined Z-score for 1977, 1978, and 1980, excluding the year 1979, was 3.21. Dr. Grossman testified that this year after year pattern is highly significant and simply could not have occurred by chance.

Table No. 7 of Plaintiffs' Exhibit 73 is an applicant flow analysis for all hires and all applicants using the application data from defendant's answer to interrogatory number 6 and the hire

data from defendant's answer to supplemental interrogatory number 4, the 1591 forms. Dr. Grossman stated that the 1591 *hiring* data used in this table was more likely to be accurate since the 1591 *hires* were in some cases greater than the *hires* listed in the MEARS. The expected hiring of blacks in the years 1977, 1978, 1979, and 1980, according to this table fell 3.45, 4.08, 13.40, and 2.93 standard deviation units short of that expected, respectively. In Dr. Grossman's opinion, not only is the Z-score for *each* year statistically significant, but the year by year pattern shows overwhelmingly that this pattern of hiring could not have been due to chance. Furthermore, setting aside the year 1979 with the highest Z-score of 13.40, the combined Z-score for 1977, 1978, and 1980 was 5.54. Dr. Grossman testified that the probability of this having been due to chance alone is again less than 29 out of 100,000,000.

Table No. 8 of Plaintiff's Exhibit 73 is Dr. Grossman's response to the defendant's contention that the MEARS applicant data for the year 1979 is inaccurate. A comparison of the MEARS applicant data and the actual count of applications for 1979 indicated that the actual number of applications was 1,577 while the MEARS report listed 1,196 applications for the year. Dr. Grossman concluded that the higher number was more likely to be correct because there were actual applications to support that number. In Table No. 8, Dr. Grossman assumed that the additional 381 applications which were in the possession of the defendant and not apparently listed on the MEARS were *all* from white applicants. Dr. Grossman indicated that this assumption would increase the availability of white applicants and correspondingly decrease the expected number of black hires—an assumption favorable to the defendant. Comparing the resulting applicant data with the 1591 hiring data under this assumption, Dr. Grossman arrived at a Z-score of 8.67 standard deviation units for the year 1979.

2. The Plaintiffs' Static Work Force Statistics.

In addition to the applicant flow analysis, the plaintiffs also presented a static view of the defendant's work force for the years 1974 through 1983. Plaintiffs' Exhibit 80 summarized the defendant's EEO-1 forms for those years. This exhibit showed that blacks were excluded entirely from some job categories and that the highest percentage of black employees was found in the lowest paying job categories.

3. Anecdotal evidence.

A good portion of the plaintiffs' case consisted of evidence concerning an incident on March 27, 1979 in Carbondale Illinois, where a number of blacks from the East St. Louis, Illinois area applied for jobs. The plaintiffs presented the testimony of a number of the class members who applied for a job at Carbondale on the day in question. These individuals testified that they were referred to the Carbondale office by Capitol Employment Agency, a private employment agency. Each individual testified that a large group of predominately black individuals (between 120 and 179) were present on March 27, 1979 in Carbondale seeking a job. The testimony of each individual indicated that he was present on March 27, 1979 in Carbondale, that he filled out an application, that he was ready, willing, able to work, that had asked, he would have been willing to relocate, and that he was never contacted by the railroad.

The plaintiffs also presented the testimony of a few white individuals who were hired by the defendant during the relevant time frame and who resided at a distance of greater than fifty miles from their work location.

D. The Defendant's Evidence.

1. Statistical Analysis.

Prior to performing his extensive demographic analysis, Dr. Peterson indicated that he analyzed the accuracy of the defen-

dant's data and attempted to verify the defendant's position that distance from the workplace was a factor in its hiring decisions.

Dr. Peterson testified that he collected a large amount of data and documents from the defendant in order to analyze defendant's labor markets and hiring practices. He indicated that he interviewed various company officials and he was advised that defendant had a long standing policy of applying distance of an applicant from the initial job location as a factor in its hiring decision. Dr. Peterson collected all of the MEARS available. He collected all of the applications available. He also utilized the defendant's Form 1591, the defendant's federal withholding form, which he concluded was the most accurate evidence of each of the defendant's hiring decisions in its St. Louis division between 1976 and 1980. The 1591 form also indicated the place of residence of each applicant hired and his initial job location. Dr. Peterson testified that he checked the accuracy of his data bases against documents entitled "Year End Tapes," which are computer tapes maintained by the defendant at its Chicago headquarters and which contain numerous bits of data concerning each of the defendant's employees at the end of each year being considered by the court. Dr. Peterson also testified that he confirmed the accuracy of his data base by cross-checking that data against payroll log books that were maintained by the defendant at its Chicago headquarters.

In order to confirm or refute defendant's contention that its labor markets were local and directly related to its job locations, and to confirm or refute defendant's contention that it used distance of an applicant's residence from the job location as a factor in its hiring decisions, Dr. Peterson indicated that he analyzed each of defendant's hiring decisions between 1976 and 1980 in its St. Louis division. Dr. Peterson and his staff, utilizing the data in the defendant's 1591 withholding forms, actually measured the distance that each person hired on the division lived from the individual's initial job location at the time of hire.

This measurement data was then programmed into a computer at Dr. Peterson's Personnel Research offices in Durham, North Carolina. This computer printout was contained in Defendant's Exhibit 4 and is entitled "LOCDISTF." Based upon the information contained in this printout, Dr. Peterson generated various graphs and maps pertaining to defendant's labor markets and geographic hiring which have also been admitted into evidence. Dr. Peterson concluded that the defendant consistenly hired 80% or more of its employees into each of its numerous job locations in the St. Louis division from a distance of less than 50 miles.

Dr. Peterson also analyzed the accuracy and completeness of various types of employment records that he obtained from the defendant. Dr. Peterson stated that the purpose of this analysis was to determine the most proper form of study to be utilized. Dr. Peterson testified at length at trial that an accurate and adequate applicant flow analysis could not be performed in this case due to the incompleteness and inaccuracy of the applicant data available. He testified that his analysis showed that the applicant data contained in the MEARS was inaccurate. He indicated that there were large chronological gaps in the actual applications retained by the company and that there was no way to create an accurate applicant count. In addition, he pointed out that none of the actual applications received into evidence contained a racial designation for the applicant. Dr. Peterson concluded that a proper applicant flow analysis could not be conducted based upon the application data contained in the MEARS because that document did not contain any information concerning the residence of applicants and did not contain any information pertaining to the locations of jobs available at the time any application was pending.

In Dr. Peterson's opinion, the only available method to analyze the defendant's hiring practice in its St. Louis division between 1976 and 1980 was a demographic analysis comparing actual black hires to expected black hires based upon the 1980

United States census data. Dr. Peterson testified that this 1980 U.S. Census data was the most accurate data available for use in a demographic study.

Dr. Peterson performed three different types of demographic analyses of defendant's hiring practice in its St. Louis division. He performed each of these three analyses on three different periods of time: 1976 through 1980; December 8, 1978 through January 9, 1981; and finally, 1979 and 1980.

The first demographic analysis performed by Dr. Peterson was described as a county by county analysis. Dr. Peterson identified each of the counties within the defendant's St. Louis operating division. He testified that he obtained U.S. Census data for each county which identifies the availability of black persons for hire in various job categories. To determine the availability of blacks in each county within which the defendant hires, Dr. Peterson in this first analysis utilized what he has described as a diminished civilian labor force. The diminished civilian labor force availability numbers that he used excluded officers, managers, professionals, technicians, and sale workers. Dr. Peterson indicated that he utilized this diminished availability number because the evidence had shown that defendant made only eight hires into the categories excluded from the availability pool between 1976 and 1980.

In Dr. Peterson's first demographic analysis, he compared the actual number of blacks hired residing in each county to the availability of blacks in the diminished civilian labor force for the individual's county of residence. Dr. Peterson then performed, on a county by county basis, statistical calculations to show whether or not the defendant's hiring decisions in each county were occurring by random chance. He expressed his results in terms of standard deviations. Defendant's Exhibit 4 contains computer printouts which show the results of these calculations. Dr. Peterson stated that his calculations of standard deviations county by county were well within the most

stringent two standard deviation level recognized by courts for the determination of statistical significance in discrimination cases. Dr. Peterson statistically aggregated the results from the county by county analysis over all the years studied. Dr. Peterson concluded that defendant hired a total of 1,230 employees, including rehires, (and excluding 4 hires from Michigan, Indiana and Kansas), from 1976 to 1980. One hundred nineteen of those hired were black. Dr. Peterson's statistical calculations based upon the census data showed that defendant's overall expected black hires during that period should have been 99.386 individuals. In terms of standard deviations, defendant's black hires compared to its actual hires in this first analysis shows a positive standard deviation of 2.13797. This indicates that the defendant had hired more blacks than would be expected if the defendant's selections were by random chance. (Defendant's Exhibit 4 § DCLFALLF pp. 21-22).

In Dr. Peterson's second demographic analysis, he compared the actual number of blacks hired with the number of blacks expected to be hired, not only county by county, but also EEO category by EEO category. The census data available for each county in the defendant's St. Louis operating division contains availability data broken down by EEO category such as clerical, laborer, operative, and crafts. County by county and EEO category by EEO category Dr. Peterson compared the number of black hires in the Division within each category to the census data pertaining to the availability of blacks in each county and in each EEO category within the county. Dr. Peterson performed this analysis by both including and excluding rehired individuals. Dr. Peterson expressed his results in terms of standard deviations broken down EEO category by EEO category for each county. In reviewing Defendant's Exhibit 4 which contains the computer printout, Dr. Peterson concluded that category by category within each county the defendants were well within the two standard deviation level recognized by courts in considering discrimination issues.

Again, in this second analysis, Dr. Peterson statistically aggregated all of these calculations into one overall test of the defendant's hiring practices between 1976 and 1980, county by county, EEO category by EEO category. Between 1976 and 1980, defendant hired a total of 1,227 employees (excluding 4 hires from Michigan, Indiana, and Kansas and 3 hires for which the initial job could not be determined), 119 of whom were black. Comparing this number broken down by EEO category with the availability data contained in the census for each county based upon EEO category, Dr. Peterson concluded that 118.089 blacks would have been the expected number of blacks hired if defendant's hiring choices were being made by random selection. Thus, defendant's actual black hires exceeded the expected black hires utilizing this type of analysis. Dr. Peterson expressed this in terms of a positive standard deviation of .0939966. (See Defendant's Exhibit 4 § EEOAVLF pp. 33-34).

Excluding rehires in the second application of this analysis, Dr. Peterson concluded that defendant hired a total of 1,148 employees between 1976 and 1980 in its St. Louis division. There were 111 people hired who were black. There were 112.34 expected black hires in the St. Louis Division based upon 1980 census data broken down by EEO category. This is expressed in terms of a negative standard deviation of 0.17038 which, Dr. Peterson concluded, was well within the most stringent 2.00 standard deviation test applied by courts for statistical significance.

Dr. Peterson's third demographic analysis was organized by job locations. This study shows the counties from which employees were hired for each job location. This study also shows the availability of blacks based upon census data for each job location EEO category by EEO category. Dr. Peterson statistically weighted each county's participation in the black availability pool for each job location by mathematically qualifying each county's participation based upon the numbers of employees the ICG actually drew from each county. The results

of Dr. Peterson's third demographic analysis were not significantly different from the results of the first two analyses discussed previously. In terms of standard deviations, Dr. Peterson concluded that the defendant's performance was well within the norms adopted by courts for a determination of statistical significance in discrimination cases.

In addition to this analysis of the five-year time frame, Dr. Peterson also performed the same type of analyses on more focused periods of time: December 8, 1978 through January 9, 1981, and 1979 and 1980. Dr. Peterson indicated that the purpose for refocusing the analysis to the December 8, 1978 through January 9, 1981 time period as that it conforms with the time parameters of the class claims under Title VII. He stated that the analysis of 1979 and 1980 was performed because of defendant's contention that under § 1981 the time frame of plaintiffs' claims was limited to those two years. The type of analyses performed by the defendant for each of those segments of time was exactly the same analyses performed for the broader period of 1976 through 1980 and the results were similar.

Ironically, shortly after Dr. Peterson became involved in the case, he performed an applicant flow analysis substantially similar to that performed by Dr. Grossman on information provided by the defendant. The results of this analysis were similar to the results Dr. Grossman obtained. Dr. Peterson stated that he performed such an analysis to ascertain the defendant's potential exposure in this case.

2. The Defendant's Anecdotal Evidence

Division superintendent, James Johnson, testified about the defendant's policy of hiring locally. He also testified at length about the defendant's reasons for having such a policy. Mr. Johnson stated that it was his experience over many years on the railroad that employees in general will bump back to job locations closer in proximity to their place of residence. These bumping rights are guaranteed to employees under their union

contracts. Mr. Johnson testified at length about the additional expense and administrative difficulties that bumping practices create for the defendant. It was Mr. Johnson's testimony that it was more beneficial for the company to hire individuals close to their initial job location than it was to hire individuals from great distances who would usually end up bumping back to job locations nearer to their residence. Mr. Johnson pointed out that, under certain circumstances, the defendant is obligated pursuant to collective bargaining agreements to pay moving expenses and other expenses for certain employees who are moved from jobs close to their residence to jobs farther away. Mr. Johnson also testified that the only opportunity that the defendant had to obtain a local work force was at the time of initial hire.

Superintendent Johnson testified that absenteeism and tardiness are high among persons who live great distances from their job location. He testified that, as a matter of policy, it is better for the company to atttempt to hire individuals who reside close to their job location in order to correct for these problems.

Superintendent Johnson also testified that in emergencies, defendant is required to call laborers and other employees in on short notice and that it is difficult to do so if the employees live great distances from the job site. In order to correct for this situation at the time of initial hire, the defendant for many years has had a policy of hiring individuals close to job locations who would be more readily available for emergency service.

E. The Court's Analysis of The Plaintiffs' Case.

1. The Accuracy of the Data Upon Which the Plaintiffs Relied.

[2] Prior to analyzing the statistical evidence, the Court feels obligated to comment at length on the accuracy of data upon which the plaintiffs' expert relied. One of the defendant's ma-

jor attacks on Dr. Grossman's applicant flow analysis was that the applicant information was inaccurate both in terms of numbers of applicants and their race designation. This attack generated numerous arguments and several motions both in the few months before trial and during trial. The plaintiffs argued that the defendant should be bound by its interrogatory answer and the data contained in its MEARS. In September of 1985, the plaintiffs asked the Court to allow them to obtain an additional expert to perform a demographic analysis because the applicant data upon which Dr. Grossman relied to perform his applicant flow analysis was inaccurate and because Dr. Grossman was not qualified to perform a demographic analysis. The defendant venomously opposed a second expert arguing that the plaintiffs were aware or should have been aware of the discrepancies in the MEARS and the answers to the interrogatories in March of 1984. Viewing the dispute as merely involving a difference of approach to the case, the Court denied the plaintiffs' request, and set the case for trial on its November, 1985 docket.

After listening to all the arguments, and the testimony concerning the preparation of the MEARS, the Court finds that any inaccuracies in the MEARS did not substantially affect the plaintiffs' applicant flow analysis.

Dr. Grossman obtained the applicant information from the MEARS, the only available source of applicant data other than the applications themselves. The MEARS were the monthly employment activity reports and were used to monitor the defendant's affirmative action plan. They were the only source of applicant information supplied to the defendant's equal employment opportunity department (EEO). Mary Annette Lane, the defendant's hiring person for the St. Louis, Missouri division, testified that she prepared the MEARS monthly in Carbondale, Illinois and sent them to Ellen Grossberg, the defendant's EEO director. The MEARS contained a tally of both the number of applicants and the number of hires by sex,

race, and EEOC category. (See for example Plaintiffs' Exhibit 26). Lane testified that the applicant numbers were arrived at by merely counting the number of applicants she received for a given month. Lane indicated that after receiving the application from the applicant, she or her assistant Ellen Mertz place either a "1" or "2" on the application. The number "1" indicated that the applicant was a white male, and the number "2" indicated that the applicant was a black male. Lane added that if no number appeared on the application she would assume that the applicant was a white male. She admitted that this assumption would make the MEARS inaccurate. She also speculated that a possible explanation for the higher number of applications than that reflected on the MEARS for certain months could have resulted from the fact that if an applicant were hired, his application was placed in his employment file and taken from the pile that she would count to arrive at the applicant side of the MEARS. She also alluded to the fact that some applications could have been lost. However, Lane testified that during the years in question she believed that the MEARS were accurate.

As indicated earlier, Dr. Peterson performed an analysis to check the accuracy of the applicant count data and the hiring data contained in the MEARS. Dr. Peterson made a comparison of the MEARS applicant count or applicant flow data with the actual applications in the possession of the defendant. Dr. Peterson testified that this comparison showed that for some months there were more applications than the number of applicants reported on the MEARS. Dr. Peterson also testified that for other months the defendant had more actual applications than the number of applicants reported on the MEARS. Dr. Peterson's analysis of plaintiffs' data base is contained in Defendant's Exhibits 39 through 44. Based upon this evidence, Dr. Peterson concluded that the monthly count of hires and applicants contained in the MEARS was completely inaccurate.

There is no question in the Court's mind that the information contained in the MEARS was incomplete and to a certain ex-

tent inaccurate. The more important issue, however, is whether these flaws affected Dr. Grossman's analysis. The court finds that they did not. Dr. Grossman's analysis was not based on the actual numbers of black and white applicants, but on the relative percentage of black applicants to white applicants. Unless it can be shown that either the numerator alone or the denominator alone of this percentage is inaccurate or that both are distorted other than on a random basis, the percentages are not affected. Here, only one flaw could have affected the numerator or denominator other than on a random basis and that was Lane's assumption that no number on the application indicated that the applicant was a white male. However, the bias created by this assumption could only favor the defendant because it would increase the number of white applicants resulting in a lower percentage of blacks than one would expect should be hired. There is nothing to indicate that the losing of applications, the noninclusion of hired applicants, or other errors occurred other than on a random basis.

Of course, the Court is mindful of the fact that because the data was incomplete, the plaintiffs' analysis is based only on a sample of the actual population of applicants. However, because the sample size was so close to the actual population, the Court is convinced that the sample was an accurate representation of the entire applicant pool.

Although not necessary because of the above finding, the Court is persuaded by the plaintiffs' argument that the defendant should be estopped from attacking the inaccuracy of the data it supplied the plaintiffs. In the typical Title VII hiring case, where statistics play a major role, it is the defendant who argues for the use of an applicant flow analysis and the plaintiff who attacks the accuracy of the defendant's data. Here the table is reversed. There is a certain amount of irony in an employer defending in part a major discrimination case on the theory that the information it keeps for its own affirmative action plan and which it supplies to the plaintiffs via an inter-

rogatory answer is inaccurate and should be discarded. Further, it's interesting to note, that neither Lane, the person in charge of hiring, nor Grossberg, the director of the defendant's EEO department, questioned the accuracy of numbers which, taken at face value, showed no major differences between the number of blacks who applied and who were hired. It was not until after Dr. Peterson performed an applicant flow analysis and then later tested the data upon which it was based that the accuracy of the data was questioned. Once the defendant learned of the inaccuracies, it did not inform the plaintiffs, nor did it amend its interrogatory answer. The defendant points out that the plaintiffs could have very easily verified the accuracy of the MEARS and the interrogatory answer because they had the applications and they knew of the existence of the defendant's 1591 form. However, the Federal Rules of Civil Procedure do not require a party to verify an opposing party's answer to an interrogatory; they do not require that a party update his prior response if he obtains information upon the basis of which he knows that the prior response was incorrect. Fed.R.Civ.P. 26(e)(2).

The Court realizes that the defendant cannot be held liable for keeping bad records nor should it be penalized for doing so. However, where the plaintiffs are totally at the mercy of the defendant to provide them with data, and the defendant does not *immediately* notify the plaintiffs of problems with the data, the defendant should not be able to gain an advantage by arguing that the Court should disregard the plaintiffs' analysis because it was generated from inaccurate and incomplete data.

2. The Plaintiffs' Applicant Flow Analysis.

While the Court has found that the irregularities of the data upon which Dr. Grossman based his applicant flow analysis did not affect his analysis, the defendant has also argued that Dr. Grossman made a number of faulty assumptions. First, the defendant indicates that in preparing his applicant flow analysis, Dr. Grossman assumed that an application filed at any

time during the year was active throughout the year, an assumption contrary to the testimony of Lane who testified that an application remains pending for only six months. Second, and in a related vein, Dr. Grossman matched applications filed in the later months of the year with hires that occurred earlier in the year.

The Court finds that neither assumption substantially affected the validity of Dr. Grossman's analysis. Both assumptions deal with timing problems inherent in any applicant flow analysis. However, where the analysis encompasses a number of years, as here, these timing problems are vituraly eliminated. For example, while in year one, applications filed late in the year are matched against hires made earlier in the year, in year two, applications filed early in the year are matched against hires made early in the year even though those hired probably filed their applications later in year one. This "rollover" effect nullifies any serious timing problem so long as a number of years are considered. Here, Dr. Grossman's analysis included the years 1977 through 1980. A good deal of the defendant's argument is undermined by the fact that Dr. Peterson's applicant flow analysis made the same assumptions.

The Court concludes therefore, that Dr. Grossman's analysis was not affected by flaws in the data base, nor by the two above assumptions.

3. The Plaintiffs' Static Work Force Statistics and Anecdotal Evidence.

In addition to the above applicant flow analysis, the plaintiffs presented two additional pieces of evidence to buttress the results indicated by that analysis. First, the plaintiffs presented a great deal of testimony concerning the March 27, 1979 incident, wherein a number of the class members applied for jobs at the Carbondale, Illinois office. Second, the plaintiffs offered into evidence various exhibits that showed the composition of the defendant's St. Louis Division work force by race at various times between 1976 and 1980.

At the outset, the Court emphasizes again that it has viewed this case essentially as a statistical analysis case. Neither of the above two types of evidence alone, or together would establish a prima facie case for the plaintiffs. The Court finds from the static work force statistics that the defendant employed, for the period between 1976 and 1980, a great deal more whites than blacks and that the highest concentration of blacks appeared in the lower paying unskilled jobs.

The Court also finds, however, based on the evidence presented by the defendant that this disparity is a result of hiring decisions made prior to the relevant time periods. In fact, James Johnson, superintendent of the defendant St. Louis division, estimated that eighty percent of the defendant's employees in 1976 through 1980 were hired prior to the enactment of Title VII. He attributed this result to the defendant's seniority system. Therefore, the Court has placed little value on these static work force statistics. See *Griffin v. Board of Regents of Regency Universities,* 795 F.2d 1281, 1290 (7th Cir. 1986).

With respect to the March 27, 1979 incident, the Court finds that between 120 and 179 black individuals from the East St. Louis area applied for jobs at the Carbondale office, were qualified for the jobs in which they applied, were willing to relocate, but were not hired despite job openings in the St. Louis Division. This finding alone cannot establish a pattern and practice of discrimination, but does buttress the plaintiff's statistical analysis.

4. The Plaintiffs' Prima Facie Case.

In order to place the Court analysis in the legal framework, the Court specifically finds that the plaintiffs' evidence made a prima facie case of discrimination for both the pattern and practice disparate treatment claims and the disparate impact claims. The plaintiffs' applicant flow analysis showed statistically significant differences between the number of blacks who applied during the relevant time periods and the number of blacks

who were hired during the relevant time periods. In addition, the plaintiffs' anecdotal evidence buttressed the inference created by the analysis.

The Court further finds that the defendant's attempt to rebut this prima facie case by demonstating that the plaintiffs' analysis was inaccurate has failed. As indicated earlier, neither the flaws in the data base nor the timing assumptions substantially affected the plaintiffs' analysis. The remainder of the Court's discussion concerning the class claims will pertain to the defendant's attempt to rebut the plaintiffs' prima facie case by showing that distance from the work force was a non-discriminatory explanation for the plaintiffs' results.

F. The Court's Analysis of the Defendant's Rebuttal.

1. The Distance Factor

The defendant's major attack on the plaintiffs' case was that it failed to account for the defendant's practice of hiring from local areas. The defendant's evidence in this regard was threefold. First, the defendant presented evidence to show that, by and large, it hired applicants who lived within fifty miles from the job location. Second, the defendant presented evidence to justify its practice of local hiring. Third, the defendant presented Dr. Peterson's demographic analysis based on local labor markets to demonstrate that there was no statistically significant difference between the number of blacks that should have been hired and the number of blacks that were actually hired.

Based on the evidence presented, the Court finds that distance from the workplace was a factor in the defendant's hiring decisions. Dr. Peterson's unrefuted study clearly demonstrated this fact. Defendant's Exhibit 24 graphically shows that during the years in question, the defendant hired individuals who lived less than fifty miles from the workplace over eighty percent of the time. This exhibit also shows that in

almost fifty percent of the cases, the hired individual lived within twenty miles from the workplace. While there were exceptions to this occurrence, the Court finds that for the time frames in question the defendant had a practice of using distance as a factor in its hiring decisions. However, the Court specifically finds, and Defendant's Exhibit 24 clearly indicates, that the defendant did not have a clear-cut pass-fail fifty mile rule.

The Court also finds that this distance factor was justified. As indicated earlier, James Johnson, the St. Louis Division Superintendent, testified as to the reasons for this practice. He stated that in general, railroad employees will bump back to job locations closer to their place of residence. He indicated that such a practice creates additional expenses for the defendant because it is obligated in some cases to pay moving expenses and other expenses of these individuals. He also testified that absenteeism and tardiness is higher among employees who live at great distances from their job. Finally, Mr. Johnson testified that it was more efficient to deal with emergencies when the employees lived closer to the workplace.

The Court finds these reasons to be sensible and reasonable. The defendant's St. Louis division encompassed, at the time periods in question, portions of four states stretching from East St. Louis, Illinois in the northwest to Centralia, Illinois in the central, to Carbondale, Illinois in the south central, and Paducah and Watts, Kentucky in the far south. The plaintiffs' expert assumed that this entire division represented one labor market; that applicants from the northern section of the Division would be considered for jobs in the southern section. The Court does not believe that such an assumption is practical nor that the defendant should be required to hire any applicant no matter where he resides.

The defendant has convinced the Court that distance was a factor in its hiring decisions and that this factor was justified. While the Court would have liked to have seen studies or reports

to back up Mr. Johnson's concerns, the Court has called upon its common sense to confirm Mr. Johnson's views. Failure of Dr. Grossman to account for the many individual labor markets creates an adequate rebuttal of the inference of discrimination.

2. The Defendant's Demographic Analysis.

The defendant also presented a very detailed demographic analysis of its hiring decisions taking into account distance as a factor. This analysis demonstrated that there was no statistically significant difference between the number of blacks expected to be hired and the number of those actually hired. Despite the great deal of time and money the defendant spent on this analysis, the Court is not convinced that Dr. Peterson's demographic study completely analyzes the defendant's hiring practices.

The most serious flaw in Dr. Peterson's analysis was in his attempt to account for the defendant's local hiring practice. Dr. Peterson's approach was as follows: First, he would determine for each work location and category considered from what county the new hires came. Second, he would determine the percentage of blacks in the diminished civilian labor force for each of those counties. Third, he would then multiply the percentage in step two with the number of actual hires from that county to arrive at an expected number of black hires. Finally, he would compare the number of expected black hires with the number of actual black hires and compute a standard deviation for the difference. By defining the labor market based on the actual hires, the approach fails to detect a discriminatory practice referred to as "leap-frogging." As Dr. Rosenblum, the plaintiffs' rebuttal expert indicated, Dr. Peterson's approach allows the defendant to leap over heavily populated black counties with little or no detection by Dr. Peterson's analysis. For example, assume that there exists two adjacent counties, one composed of all white individuals and the other of all black individuals. Further, assume that each county is of equal distance from the work location. Under Dr. Peterson's analysis, if the

defendant hired all of its employees for that location from the white county, the resulting standard deviation would be zero indicating perfect parity. This phenomenon occurs because since the defendant only hired from one county, only that county's diminished civilian work force is considered. In the Court's hypothetical, because the county from which hires were made comprised entirely of white individuals, the expected number of black hires was zero. While the Court's example is extreme, because the approach weighs more heavily those counties in which the defendant actually hired, Dr. Peterson's analysis appears somewhat distorted. Of course, the extent of this distortion depends upon the actual racial composition of the counties in the St. Louis division, whether blacks and whites are segregated by county, the population of these counties, and whether these counties are located close to the defendant's job locations. Defendant's Exhibit 4 (program styled DCLFVIIF) shows that five counties from which hires were made have a black diminished work force in excess of twenty percent. Unfortunately, the Court is unable to qualify the effect of this flaw without engaging in a demographic analysis in which the defendant's labor markets are defined by distance rather than past hiring practices. Dr. Peterson's analysis proceeds on the assumption that because the defendant usually hired individuals who resided within a fifty mile radius, he could form his labor markets using the demographics of the counties from which these individuals came. However, the fact that defendant tended to hire locally does not necessarily lead to the conclusion that his local hiring came evenly or proportionally from all the counties surrounding the job location. Defendant's Exhibits 8 through 13 show that the hiring was less than evenly distributed among the nearest surrounding counties. Hopefully, this distribution was a result of population and applicant flow rather than discrimination, but the Court has no way of assuring itself of this fact.

A minor shortcoming of Dr. Peterson's analysis was pointed out by Dr. Rosenblum. Dr. Peterson used the 1980 census data

concerning the civilian labor force as his data base. This data only reflected the number of individuals employed or experienced and unemployed or experienced and unemployed in a given job category. Schlei & Grossman, *Employment Discrimination Law*, p. 1358 n. 262 (2d Dist. 1983). "Thus, some courts have rejected the use of detailed census statistics to show the availability of qualified applicants because such statistics indicate the number of individuals employed in positions in question rather than the numbers with the qualifications and interest to be employed. . . ." *Id.* Since the jobs in question here were unskilled, and because historically blacks experienced a higher percentage of unemployment, this data tended to underestimate black availability. Further, the data does not exclude those employed who are earning as much or more than the defendant was offering for the jobs in question. Again, because blacks have been historically under-represented in high paying unskilled jobs, the data would tend to inflate the estimated availability of whites, and decrease the relative availability of blacks.

Experience would indicate that both of these flaws in the census data favored the defendant. The extent of this prejudice again cannot be determined. Dr. Rosenblum indicated that alternative data sources exist which account for income, educational levels, and commuting preferences.

G. The Court's Conclusion Concerning The Class Claims.

[3] As indicated earlier, the plaintiffs' evidence was sufficient to establish a prima facie case of disparate treatment and disparate impact. The plaintiffs' applicant flow analysis showed that there existed statistically significant differences in the number of blacks who applied for jobs with the defendant and those who were hired. This difference created an inference that the defendant engaged in a pattern of disparate treatment towards black applicants or that its hiring process, specifically its application of the distance factor, had a disparate impact on blacks. This inference was buttressed by the testimony concerning the March 27, 1979 incident and to a lesser degree by the plaintiffs' static work force statistics.

The defendant did not rebut this inference with its attack on the data used in the applicant flow analysis or its attack on the timing assumptions made in the analysis.

The defendant was able to persuade the Court that distance from the workplace, the defendant's practice of local hiring, accounted for the differences indicated by the plaintiffs' applicant flow analysis. Under the disparate treatment theory, this factor was enough to rebut the inference of discriminatory treatment towards blacks. Under the disparate impact theory, the defendant has persuaded the Court that the practice of local hiring is necessary and related to its business.

The plaintiffs have failed to show that the defendant used the local hiring practice as a pretext for discrimination.

The Court indicated earlier that it viewed the class case as a statistical case, yet it might appear as if the Court totally disregarded the statistical evidence and decided the case on the nonstatistical distance factor. While the distance factor ultimately turned the tide for the defendant, the Court did not disregard the statistical evidence. Neither party's statistical analysis was without fault. However, both analyses revealed something about the hiring process on the St. Louis Division and these revelations are not totally conflicting. The plaintiffs' applicant flow analysis indicated that, based on applications received in the Division, there existed statistically significant differences in the percentage of black applicants as compared to black hires. The defendant's demographic analysis revealed that there existed no statistically significant differences between the percentage of blacks hired and the percentage of blacks expected to be hired based on the demographics of the surrounding areas. Viewing both results as reasonably accurate, the Court is left with one definite conclusion and two possible alternate conclusions. First, the two analyses definitely indicate that blacks applied for jobs in the St. Louis Division in a greater percentage than their percentage in the diminished civilian labor force. Second, in light of this fact, and because of the different

conclusions reached by the experts, either the defendant discriminated against black applicants or the black applicants, for the most part, applied for jobs when the defendant was hiring for job locations in predominately white areas. Obviously, the Court's conclusion implicitly adopts the latter alternative.

The nonstatistical evidence at trial also supports this latter occurrence. Dr. Grossman, the plaintiffs' expert and a labor economist, stated that based on his studies of the railroad industry and his knowledge of economic literature, blacks are more willing to migrate towards high paying low skill railroad jobs. The testimony from the individuals who were present on March 27, 1979, indicated that these individuals were willing to relocate or commute from great distances in order to get a job with the defendant. However, the fact that the defendant received a high percentage of black applicants and that these applicants were willing to relocate or commute from great distances does not mean that the defendant was obligated to hire these individuals. The law does not require the defendant to hire blacks who reside at great distances from the workplace when there exists equally qualified and available whites who live closer to the workplace, so long as distance from the workplace is a reasonable and legitimate consideration. For the reasons expressed above, the Court found that in this case the distance from workplace consideration was legitimate and reasonable.

Further, the fact that the applicant may be willing to relocate initially does not persuade the Court to conclude that the defendant is obligated to hire him. As stated earlier, because of the defendant's seniority system, these individuals, in all probability, would attempt to "bump back" towards their home with the defendant paying the corresponding expenses. More importantly however, it would not be a good business practice to overlook applicants who reside in neighboring communities and hire applicants from far away communities. While the relevant labor market for the defendant may have been world-wide in the early years of the railroad industry, this was a result of the industry's

inability to secure enough local employees. Today, with the high rate of unemployment, especially in the areas encompassing the St. Louis Division, the defendant has no need to hire from anywhere outside of its local communities.

The plaintiffs alleged that the defendant had a pattern and practice of discrimination against blacks. The Court has found that the defendant did not. The plaintiffs also alleged that the defendant's "fifty-mile" rule had a disparate impact on blacks, or alternatively, that the defendants subjective hiring process, especially the application of the distance factor, had a disparate impact on blacks. The Court found that there was no "fifty-mile" rule and that although the distance factor had a disparate impact on blacks, it was related to the legitimate interests of the defendant's business. The plaintiffs have not alleged, nor was evidence presented to show, that the defendant applied the distance factor in a discriminating way; that the defendant was more willing to hire a white who resided a great distance from the workplace than a black who resided at a great distance from the workplace. However, the plaintiffs did present evidence which showed that of the 122 individuals hired from a distance of more than fifty miles, only 3 were black. See Plaintiffs' Exhibit 86. Even if alleged, this evidence would not be sufficient to make a prima facie case. These bare numbers do not indicate when the hires occured, whether black applicants were also available, the distance from the workplace of the white hires as compared to the black hires, or the job categories into which the hires were made. Obviously, such specifics would be necessary before an inference of discrimination could be drawn. In any event, this type of allegation closely resembles the class disparate impact excess subjectively claim, although the class would consist of only those black individuals who resided at great distances from the workplace, applied for work, and were not hired even though the defendant hired a white individual who resided at a great distance from the workplace. The Court admits that Plaintiffs' Exhibit 86 raises the curiosity of the Court as to whether the defendant applied the distance factor in

a discriminatory manner to exclude this small subclass of black applicants. However, because the plaintiffs have not alleged this type of discrimination, did not present concrete evidence to support this allegation, and because the defendant obviously had no opportunity to defend against it, the Court has not considered it.

This leads to the plaintiffs' strong insistence that the Court certify a subclass of those individuals who applied for jobs with the defendant on March 27, 1979. The Court indicated earlier that it refused to certify such a subclass, but considered the evidence as evidence which buttressed the plaintiffs' claim of a pattern and practice of discrimination. Since much time and argument has been spent on this March 27, 1979 incident, the Court feels obliged to say more. It was unfortunate that such an incident occurred. However, the plaintiffs cannot make a prima facie case of a pattern and practice of discrimination over five or two year periods by demonstrating that on one day between 120 and 180 black individuals applied for jobs on the railroad and were not hired. Those applications would have only been pending a period of six months. Second, distance from the workplace would account for the defendant's refusal to hire many of these individuals, although the defendant did fill jobs in the East St. Louis area when these applicants were pending. Finally, the only allegation this subclass could maintain is that the defendant discriminated against each member individually. Certification of such a class would require the Court to hear 120 to 170 individual disparate treatment claims, something which the Court was not prepared to do nor which Fed.R. Civ.P. 23 contemplates.

H. Mister's Representation of the Class

[4] Early in this litigation, and during trial, the defendant moved to decertify the class, alleging that Robert Mister, the class representative, had failed to actively and adequately represent the class. In support of its contention, the defendant pointed out that Robert Mister lied on his application for

employment, failed to report income on his tax returns, used marijuana in the past, and had been a male prositute. The defendant further added that the evidence at trial revealed that Robert Mister was uninformed and failed to play an active role in the case.

The Court declines the defendant's requests and finds specifically that Robert Mister's shortcomings in no way affected the outcome of this case. Although Mister may have been a less than perfect choice as the representative for the class, the class claims failed for other reasons. In any event, class counsel did an admirable job in representing the class claims.

IV. ROBERT MISTERS'S INDIVIDUAL CLAIM

[5] The plaintiff presented evidence to indicate that he was a black individual who applied for a laborer's job with the railroad on March 27, 1979, that he met the physical and educational requirements for that job, that he never was offered employment, and that the defendant hired white individuals who applied after the plaintiff for the same type of job. In defense, the defendant argued, and elicited evidence to show that the plaintiff was not qualified for the job because he lied on his application for employment and that the defendant normally treats such an incident as a bar to employment. In the alternative, the defendant contends that even if the plaintiff were qualified, distance from the workplace was a legitimate nondiscriminatory reason for its refusal to hire the plaintiff. The plaintiff responded by arguing that he was qualified under the *McDonnell Douglas* formula because the defendant did not learn of the misstatement until several years after the application and because in any event, the misstatement could not have been a factor in the defedant's hiring decision because the defendant did not normally check the applicant's references. The plaintiff adds that the fact that the defendant offered the plaintiff a job in the EEOC negotiations refutes the defendant's contention that the plaintiff was not qualified.

The Court concludes that the plaintiff failed to establish a prima facie case under the *McDonnell Douglas* formula. Because the class claims failed, the plaintiff was not entitled to any presumption that the defendant had unlawfully discriminated against him. See *Coates v. Johnson & Johnson*, 756 F.2d. 524, 552 (7th Cir.1985). The Court finds that the plaintiff, as a black male, was a member of a protected class, and that the plaintiff applied for a job with the defendant. However, the Court specifically finds that the plaintiff's misstatement on his application, a fact that was *not disputed*, together with his poor work history, disqualified him for employment with the defendant. Both Mary Annette Lane and James Johnson testified that lying on an application was a ground for rejection. Further, the Court finds that although the defendant did not check references in all cases, it did have a practice of generally checking references.

The heart of the plaintiff's argument, and that which is most troubling to the Court is that since the defendant did not know of the misstatement, or the poor work history, its decision not to hire the plaintiff was in no way affected by these facts. However, the plaintiff must objectively establish that he was qualified for the job in question before the Court will analyze the defendant's allegedly discriminatory actions. A defendant is not liable under Title VII for not considering an applicant even for discriminatory reasons, if the applicant was not minimally qualified for the job. If the plaintiff can make a prima facie case, the defendant may still argue that the plaintiff was not qualified, but the defendant at this stage cannot rely on information obtained after the decision not to hire the plaintiff was made. *Eastland v. Tennessee Valley Authority*, 704 F.2d. 613, 626, (11th Cir.1983), *cert. denied*, 465 U.S. 1066, 104 S.Ct. 1415, 79 L.Ed.2d 741 (1984). Here, the plaintiff has not convinced the Court that he was minimally qualified for the job in question.

Alternatively, and as a practical matter, because the Court found that the defendant in all likelihood would have checked the references soon after the plaintiff would have been hired, the plaintiff's damages would be minimal at best even if he could establish liability.

V. ORDER

For the above reasons, the Court directs the Clerk to enter judgment for the defendant and against the plaintiff on both the individual claim and the class claims.

IT IS SO ORDERED.

APPENDIX B

Robert Earl MISTER, on behalf of himself and all others similarly situated,

Plaintiff-Appellants,

v.

ILLINOIS CENTRAL GULF RAILROAD COMPANY,

Defendant-Appellee.

No. 86-2381

United States Court of Appeals,
Seventh Circuit

Argued Sept. 22, 1987

Decided Oct. 29, 1987.

Class of black applicants for unskilled railroad laborer positions brought civil rights suits against railroad, alleging discriminatory hiring practices. The United States District Court for the Southern District of Illinois, East St. Louis Division, James L. Foreman, Chief Judge, 639 F.Supp. 1560, entered judgment for railroad, and appeal was taken. The Court of Appeals, Easterbrook, Circuit Judge, held that: (1) railroad's argument that railroad desired to hire local labor was insufficient to rebut prima facie showing of racial discrimination, and (2) individual black applicants who lied on job application was not personally victim of disparate treatment.

Affirmed in part, reversed in part and remanded.

1. Civil Rights key 44(1)

Class of black individuals alleging racial discrimination in railroad's hiring practices established prima facie case of disparate treatment on basis of applicant flow analysis showing that there existed statistically significant differences in number of blacks who applied for jobs and those who were hired, despite random inaccuracies in statistical evidence generated by expert. Civil Rights Act of 1964, §701net seq., as amended, 42 U.S.C.A. §2000e et seq.

2. Civil Rights key 44(1)

Argument that railroad desired to hire local labor was insufficient to rebut black applicants' prima facie showing that railroad's hiring practices were racially discriminatory, although railroad was not required to show that distance accounted for decision concerning any particular applicant or that distance was important to rail operations, absent evidence that black and white applicants lived different distances from work; survey of employment records showed that 122 laborers holding jobs with single place of work lived more than 50 miles from their job site, and that all but three of those laborers were white. Civil Rights Act of 1964, §701 et seq., as amended, 42 U.S.C.A. §2000e et seq.

3. Civil Rights key 9.10

"Pretext," in context of explanation for discriminatory employment practice, is statement that does not describe actual reasons for employer's decision. Civil Rights Act of 1964, §701 et seq., as amended, 42 U.S.C.A. §2000e et seq.

See publication Words and Phrases for other judicial constructions and definitions.

4. Civil Rights key 9.10

Absence of "good" reasons for employment practice does not mandate finding that mistaken business decision is "pretext" for employment discrimination. Civil Rights Act of 1964, §701 et seq., as amended, 42 U.S.C.A. §2000e et seq.

5. Civil Rights key 9.10

"Pretext" is explanation that does not convey motivation for decision, and if hypothesis of racial motive best explains actions, then explanation is also "pretext for discrimination." Civil Rights Act of 1964, §701 et seq., as amended, 42 U.S.C.A. §2000e et seq.

See publication Words and Phrases for other judicial constructions and definitions.

6. Civil Rights key 43

Inference of discrimination from study based on Census Labor Pool Data or study based on acutal applicants is strong, and failure to replicate such inference using other data does not support finding of no employment discrimination. Civil Rights Act of 1964, §701 et seq., as amended, 42 U.S.C.A. §2000e et seq.

7. Civil Rights key 44(1)

Statistical analyses of actual applicants, examining how employer actually treated people who wanted job, are generally preferred to labor force studies in actions under Title VII alleging racially discriminatory hiring practices. Civil Rights Act of 1964, §701 et seq., as amended, 42 U.S.C.A. §2000e et seq.

8. Civil Rights key 43

Troubling effects of statistical inferences raised by applicant studies and labor force studies require thoughtful consideration in each employment discrimination case; each kind of study, for unskilled labor, is biased against finding discrimination, but there is also possibility that either study can overstate discrimination. Civil Rights Act of 1964, §701 et seq., as amended, 42 U.S.C.A. §2000e et seq.

9. Civil Rights key 9.10

Individual black applicant who lied on job application was not personally victim of disparate treatment by employer, particularly where individual applicant was twice offered employment, which he refused, after filing charge of discrimination with Equal Employment Opportunity Commission. Civil Rights Act of 1964, §701 et seq., as amended, 42 U.S.C.A. §2000e et seq.

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Richard F. Nash, Gundlach, Lee, Eggmann, Boyle & Roessler, Belleville, Ill., for defendant-appellee.

Before WOOD, FLAUM, and EASTERBROOK, Circuit Judges.

EASTERBROOK, Circuit Judge.

The Illinois Central Gulf Railroad (ICG) needs many strong backs. Would-be laborers apply to a central office, where a clerk hires from among those whose applications are less than six months old. During 1979 and 1980 the ICG had eight divisions, autonomous in hiring. The hiring office of the St. Louis division was in Carbondale, Illinois, where a single clerk hired most laborers. During 1979 the Carbondale office hired 11% of the black applicants for laborer jobs (including applicants with no preference for type of job) and 39% of the white applicants for these positions. In 1980 the railroad hired no black applicants and 6.1% of the white applicants. We have the ensuing class action, filed under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e et seq., by one the 1979's disappointed black applicants.

The district court certified a class of applicants for laborers' positions in the ICG's St. Louis division between December 8, 1978, and the filing of tne case in early 1981. After a lengthy trial, the court entered judgment for the ICG. 639 F.Supp. 1560 (S.D.Ill.1986). The court concluded that the class had established a prima facie case of discrimination under both disparate treatment and disparate impact approaches, but that the ICG had demonstrated that a neutral rule — the desire to hire laborers who lived close to work — not only accounted for the disparity but also was supported by business necessity (a requirement in the disparate impact portion of the case).

The applicant class contends on appeal that the ICG has not established that it had a policy of hiring the applicants who lived closest to their places of work, let alone that this policy produced the racially disparate effects or was justified if it did. The ICG, for its part, attacks the district court's conclusion that the class made out a prima facie case; it maintains that it did not need to offer any justification at all. We conclude, with the district court, that the class established a high probability of disparate treatment requiring the ICG to offer a race-neutral explanation for its hiring. Cf. *Furnco Construction Corp. v. Waters,* 438 U.S. 567, 98 S.Ct. 2943, 57 L.Ed.2d 957 (1978); *Teamsters v. United States,* 431 U.S. 324, 97 S.Ct. 1843, 52 L.Ed.2d 396 (1977). The ICG's explanation does not explain anything, however, because the ICG never showed that its preference for short commutes accounted for the racial disparity. The district court's contrary conclusion is clearly erroneous. See *Anderson v. Bessemer City,* 470 U.S. 564, 573-75, 105 S.Ct. 1504, 1511-12, 84 L.Ed.2d 518 (1985); *Pullman-Standard v. Swint,* 456 U.S. 273, 287-90, 102 S.Ct. 1781, 1789-91, 72 L.Ed.2d 66 (1982). The class therefore prevails on its disparate treatment theory. We do not decide whether the disparate impact theory — here principally a challenge to a "bottom line" produced by "subjective" hiring — would have supported any relief. See *Watson v. Fort Worth Bank & Trust,* 798 F.2d 791 (5th Cir. 1986), *cert. granted,* ____ U.S. ____, 107 S.Ct. 3227, 97 L.Ed.2d 734 (1987), which presents one of the many tough questions about using the disparate impact method to challenge subjective decisions, questions that we shall avoid. See also, e.g., *Griffin v. Board of Regents,* 795 F.2d 1281, 1288 n.14 (7th Cir. 1986) (reversing questions about the application of the disparate impact model to subjective decisionmaking).

I

[1] The disparate treatment claim is that the ICG considered race when making hiring decisions. The class offered several pieces of evidence that, the district court believed, established a presumptive (prima facie) case on this score. (1) The railroad

hired a much larger portion of white applicants than of black applicants. The plaintiffs' expert witness testified that there was less that one chance in a million that this disparity was consistent with raceneutral hiring. (2) The railroad hired more than 500 laborers in 1979, including 11 for work in East St. Louis. About 150 people from East St. Louis, most of them black, applied for work on March 27, 1979, while the ICG had more than 100 laborers jobs open on a repair project. The ICG did not hire a one of these applicants, though when it hired laborers to work in East St. Louis itself it turned outside that city (sometimes far outside it) to hire white laborers. (3) Although the railroad argued that its desire to hire local labor explained the disparate consequences, a survey of its employment records showed that 122 laborers holding non-mobile jobs (that is, jobs with a single place of work) lived more than 50 miles from their job sites. All but three of these laborers are white.

This combination powerfully suggests that the Carbondale office of the ICG had race on its mind when hiring laborers in 1979 and 1980. It is hard to imagine a stronger case, short of an announcement of discrimination. The ICG attacks only the statistical component of this showing, on two grounds: bad data and inaccurate assumptions about the labor market. The first is unavailing. The plaintiffs' expert used the best data available; that the data were not better is the ICG's fault, and we agree with the district court that the data at hand were good enough even though imperfect. 639 F.Supp. at 1573-75.

The argument about the labor market goes to the heart of the case. The plaintiffs' expert assumed that the St. Louis division of the ICG is a single labor market. This meant that every applicant was interested in every job, and the railroad potentially interested in every applicant for every job. Yet the St. Louis division extended more than 200 miles north to south, from central Illinois to western Tennessee, and as the ICG points out it is unlikely that applicants from one end of the division really wanted to work at the other. It adds that it was not interested in people who lived far from the places that needed laborers. Only

an analysis of many geographically smaller labor markets, the ICG insists, could support a valid conclusion about its hiring processes.

The district court did not agree with this argument, and neither do we. The ICG used one hiring office for the entire division and maintained one set of employment records. It was not possible to construct geographic markets out of preferences expressed in the applications, for there were none. The forms the railroad provided to applicants did not ask them where in the division they wanted to work or suggest that they had any say in the matter. Anyway, the expert witness did not need to examine smaller labor markets unless the geographic distribution of applicants by race was uneven. If black and white applicants throughout the ICG's St. Louis division lived (on average) equal distances from the ICG's work sites, then the assumption that there was only one labor market made no difference. Smaller labor markets would mirror the division as a whole; if the ICG's performance were better in some, it was bound to be worse in others. Only non-uniform distribution would make the study inappropriate. If, say, the black applicants predominantly lived in the center of the district while the work was located at the far north and far south, then the plaintiff's assumption would invalidate the results. The study was enough to cast on the railroad the burden of showing that the applicants were not homogeneously distributed by race with respect to places of work. But the ICG never showed that there was such a non-uniform distribution of applicants — indeed, as we conclude below, the railroad did not show even that distance from work mattered much.

The court (and therefore the expert witness) wants to test hypotheses relevant to the litigation. The witness formulates the hypothesis (such as: "the ICG was hiring without regard to race" or "the ICG was hiring labor from nearby") and uses this hypothesis to make predictions. Then the expert examines the data to see whether they confirm the predictions and thereby support the hypothesis. Much judicial discussion about

statistical evidence labors over questions whether findings are reliable enough to confirm a prediction and support or reject the hypothesis. That is, how confident can we be that chance or irrelevant details did not account for the pattern we observe in the data? Unless a chance outcome is unlikely, the study does not confirm or refute the hypothesis. Drawing from offhand footnotes in two cases, *Hazelwood School District v. United States,* 433 U.S. 299, 308-09 n. 14, 311 n. 17, 97 S.Ct. 2736, 271-42 n. 14, 2743. n. 17, 53 L.Ed.2d 768 (1977), and *Castaneda v. Partida,* 430 U.S. 482, 496-97 n. 17, 97 S.Ct. 1272, 1281-82, n. 17, 51 L.Ed.2d 498 (1977), courts have produced a "rule" that findings should be accepted as "statistically significant" when the observations are more than two standard deviations away from the values predicted if the null hypothesis (no discrimination) holds. E.g., *Palmer v. Shultz,* 815 F.2d 84, 90-97 (D.C. Cir. 1987) (summarizing cases and literature). This rule reduces the number of "Type One errors" (false findings of discrimination) at the potential cost of an increase in "Type Two errors" (finding no discrimination when there is some). Courts do this in part because departures from "random" hiring may arise because of factors other than race, factors hard to capture in the statistical models. See Paul Meier, Jerome Sacks & Sandy L. Zabell, *What Happened in Hazelwood: Statistics, Employment Discrimination, and the 80% Rule,* 1984 Am.Bar. Foundation Research J. 139, 158-70. Having decided to make tests of "statistical significance" the measure of legal significance as well, judges have offered views on the differences for this purpose between one-tailed and two-tailed tests and between Z-statistics and t-statistics. E.g., *Griffin,* 795 F.2d at 1290-91 & n. 18; *Coates v. Johnson & Johnson,* 756 F.2d 524, 536 n. 11 (7th Cir. 1985). Yet the finer points of significance-testing are pertinent only if the analyst has formulated the hypothesis correctly and decided what pattern (if established) will confirm or refute that hypothesis. The first, hardest, and often the only task is deciding what to look for. See Meier, Sacks & Zabell; Thomas J. Campbell, *Regression Analysis in*

Title VII Cases, 36 Stan.L.Rev. 1299 (1984); Daniel L. Rubinfeld, *Econometrics in the Courtroom,* 85 Colum.L.Rev. 1048 (1985). That the 1979 hiring ratios (11% of black applicants, 39% of white applicants) are more than eight standard deviations from the result the expert took as his null hypothesis is important only if the test has been specified correctly.

The ICG's argument about labor markets is an effort to persuade us that the plaintiffs' expert specified the hypothesis incorrectly. The plaintiffs replied that the ICG's decision to hire from Carbondale shows that there was a single labor market. Neither side asked whether the specification of the test adequately accounted for the hiring decision. Plaintiffs' statistical work leaves much to be desired. The plaintiffs' expert used no independent variables other than race. He assumed, in other words, that all applicants are identical in every respect except race. This is not necessarily true. For laborers' jobs, other variables matter — physical condition (for which age and a weight/height ratio may be proxies) and employment history (has the person been fired from other jobs or convicted of job-related offenses?) are important to any employer. The omission of these variables weakens the plaintiffs' case by leaving open the possibility that important, non-racial variables account for the hiring decisions. But the ICG does not suggest that these things account for the pattern of its hiring. The ICG's expert replicated the findings of the plaintiffs' expert, and the ICG does not offer any explanation other than distance from work for the startling disparity in rates of hiring. We are not about to discount the plaintiffs' statistical work on grounds that the employer, with the best access to data, chose not to raise. We therefore conclude, with the district court, that the plaintiff class made out a presumptive case of disparate treatment.

II

[2] The railroad's response to the plaintiffs' evidence is to say that distance accounts for everything. The district court found that the ICG had a preference for people who lived close to

work (where "close" meant less than 50 miles), though not a hard-and-fast rule. We accept this finding. The ICG then asserts that black applicants lived farther from the ICG's places of work. If this disparity in distance produced the disparity in hiring, the ICG would have a sufficient answer to the disparate treatment claim. (Whether it would have a sufficient reply to the disparate impact claim we need not say.) The essential ingredient of the ICG's case was proof that black applicants did live farther from the worksites, enough so to account for the different rates of hiring.

The ICG had a straightforward way to establish its claim. Applications for employment gave the applicants' addresses. The ICG could have measured the distance between the residences of "active" applicants (those who applied within six months) and the places for which it was hiring at a given moment. If the data showed that it hired the applicants who lived close by, without regard to race — that is, if black and white applicants who lived 10 miles from work had equal probabilities of being hired, and applicants who lived 10 miles from the site had higher probabilities than applicants how lived farther away — it would have had a good reply to the plaintiffs' case. But the ICG did not conduct this inquiry. Its expert regarded the applicant data as incomplete and had trouble matching the applications active at a given moment against jobs then available. See 639 F.Supp. at 1570-71. So the ICG computed the distance from work only for some 80% of the people it actually hired.

This made it difficult, though not impossible, to test the ICG's hypothesis. Showing (as the ICG did) that 80% of the laborers for which it compiled data live within 50 miles of their assigned station does not prove that the ICG used any sort of distance test in hiring. People generally want jobs close to home, and laborers especially are unlikely to drive more than 100 miles round trip daily for the wage being offered. An employer that paid no attention to the residence of its applicants likely would find that 80% or more of its employees lived within

50 miles of work; self-selection would see to that. Furthermore, the observation that 80% of those hired lived within 50 miles of work is consistent with the hypothesis that 80% of those *not* hired lived within 50 miles of the ICG's worksites. It is consistent, indeed, with the proposition that black applicants lived *closer* to the jobsites than white applicants, and that had the ICG hired more blacks it would have had a more compact labor force.

The hypotheses that black applicants live farther from the ICG's yards than white applicants and that the ICG tried to minimize the commuting distance have some testable implications, however — even if the data are limited to people actually hired. One is that the white laborers live closer to work than the black laborers do. If, for example, white applicants live (on average) 30 miles from the ICG's worksites, while black applicants live 60 miles away, and if the distributions around these means are normal, then the ICG will be hiring from the "tail" of the black applicant pool and the center of the distribution of the white applicant pool. The whites hired will live closer to work than the blacks hired; the distribution of commuting distances for white employees also will be more compact. (That is, the standard deviation of distances from work for white employees will be lower than the standard deviation for black employees.) Although the ICG hired as its expert witness a statistician who had written extensively on the subject, the ICG either neglected to test for these implications or elected not to inform the district court of its findings.

The ICG's expert introduced a number of tabulations that have allowed us to determine the averages, though with some imprecision because we used only the aggregate data the expert compiled. Black laborers hired for non-mobile jobs lived only half as far from their worksites as white laborers. The distribution of commuting distances for black laborers was much more compact.

	1976-1980		1979-1980	
	Blacks	Whites	Blacks	Whites
Mean distance from work, miles	14.2	29.4	16.5	30.7
Standard deviation of distance from work, miles	15.9	33.7	18.8	28.6

The ICG's expert did not have data for all of the ICG's employees, so we used a standard test of statistical significance to inquire whether the distances (and distributions) of white and black laborers might be the same, appearing different only because of the sampling from the pool of employees. The values of the t-test exceed 4.0 for both sets of years, which implies a probability less than one in a thousand.[1] So far the ICG's data support the plaintiffs' case rather than the ICG's.

There is a related implication: if black applicants live farther from the jobsites than white applicants, then the "exceptions" to the ICG's desire to minimize distance should favor black applicants, who will be overrepresented in the pool eligible for exceptional treatment. The St. Louis division has 122 nontraveling laborers who lived more than 50 miles from work. All but three were white. The ICG has no explanation for this datum, which was introduced at trial and is inconsistent with its contention that black applicants lived farther from work than white applicants.

It might be possible to explain these findings by showing that the ICG had some rural worksites, with predominantly white workers commuting long distances, and some urban worksites with black laborers commuting short distances; the laborers

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[1] The distribution is not "normal," so the t-test may not be the best, but its values are so large (and there are so many degrees of freedom) that we have confidence that any different method of analysis would not come up with a different answer.

commuting more than 50 miles also would be concentrated at the rural sites. But the ICG did not suggest that this accurately represents its employment picture, and none of its sites had a labor force more than 30% black, which seems to exclude the possibility we mention. (The largest urban area in the district, St. Louis and East St. Louis, easily could produce a labor force more than 30% black, and the white workers at these sites would not have commuting distances longer than the black workers.)

The ICG's statistical expert took a different approach altogether. See 639 F.Supp. at 1571-73, 1577-79. He obtained Census data about the labor force in each county within the ICG's St. Louis division and excluded professional, technical, and sales workers, arriving at a "diminished civilian labor force." The exclusion was appropriate because the ICG did not hire such people as laborers. The expert calculated the number (and percentage) of black and white employees in each county's "diminished civilian labor force." Then he determined the number of people actually hired from each county, by race, and concluded that the number of black laborers the ICG hired was less than two standard deviations away from the number that would be predicted by race-blind hiring from the "diminished civilian labor force." This approach disregarded the distance of counties from the ICG's worksites and therefore cannot establish that distance mattered. In an effort to determine the effects of distance, the expert also gave each county a "weight" based on the number of people the ICG hired from there; so, for example, if two counties of equal "diminished civilian labor force" produced 100 and 10 laborers — presumably because one county was farther from the ICG's worksites than the other — the expert would give the second county a weight of 0.10 relative to the first. Then he applied this weight to compute an adjusted, "diminished civilian labor force" and to predict the number of laborers the ICG should have hired by race and county. Using this method he concluded that the ICG had hired more black laborers than would be expected from race-blind selection.

The district court was not convinced by this evidence, 639 F.Supp. at 1577-79, and we are not either. The unweighted studies have nothing to do with the distance of potential workers (and their counties) from the ICG's places of work; they call into question the implications of the plaintiffs' applicant flow studies but do not verify the ICG's distance defense. The weighted portion of the study, which the ICG believes cures that defect, begs the question. It assumes what is to be proven — that differences in hiring are attributable to distance rather than race. The expert derived the weights from the ICG's hiring, rather than from distance. So if the ICG hired one person from an all-black county with a labor force of 100 and 10 people from an all-white county with a labor force of 100, the expert would assign the black county a weight of 0.10 and deduce that the ICG was "expected" to hire only one person from it — even if the black county were closer to the ICG's places of work than the white county. Voila! Discrimination itself produces a statistical finding of no discrimination.

We have used an extreme hypothetical, but the problem is real. Suppose there are two counties, equal in size and distance to ICG's worksites. If one county's labor force is 30% black and the other county's labor force 10% black, race-blind hiring from these two counties as a unit should produce a labor force 20% black (if people apply for work in proportion to their numbers). Suppose, however, the ICG hires only from the second county (with 90% white laborers). The first county will receive a weight of zero, and if the ICG's hires are 10% black the study will conclude that there has been no discrimination. This is an artifact of the way in which the hypothesis was formulated. We need not go into the details of statistical significance to see that the results are unreliable. The plaintiffs offered evidence that some counties, with relatively large black labor forces, had been skipped over while the ICG hired from other, "whiter" counties farther from its workplaces. Four counties in the St. Louis division have "diminished civilian labor forces" more than 20% black. The ICG hired significant

numbers of employees from only one of these counties, while hiring larger numbers from adjacent counties.

So the defendants' statistical work simply does not show that distance accounts for the racial differences in the rate of hiring. The district court found that the ICG used distance as a ground of decision and apparently believed that this finding carried the day for the railroad on the disparate treatment claim. But it does not; there must be a causal link between criterion and consequence. Only that causal link would compel the plaintiff class to demonstrate (in the disparate treatment portion of the litigation) that the railroad was using distance to get at race (because of, not just in spite of, its disparate consequence). The only piece of evidence providing the causal link was the statistical study, which the district court set aside (correctly, we have held). That left the ICG's burden of production unsatisfied.

This is so even though we have considered only the plaintiffs' disparate treatment theory. Under *Texas Department of Community Affairs v. Burdine*, 450 U.S.248, 101S.Ct. 1089, 67 L.Ed.2d 207 (1981), once the plaintiff establishes a prima facie case the employer need only "articulate rather than "prove" a non-discriminatory explanation for its conduct. The plaintiff then must show that the employer intentionally used race as a ground of decision, and that this caused injury. *Burdine*, 450 U.S. at 254-56,101 S.Ct. at 1094-95; *Pollard v. Rea Magnet Wire Co.*, 824 F.2d 557 (7th Cir.1987). We may assume that this allocation of burdens applies even in pattern-or-practice litigation, although it has much in common with disparate impact litigation, as *Teamsters* and *Furnco* show. The pattern-or-practice case starts with a stronger showing than the individual disparate treatment case; the "prima facie case" under *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973), supports only a weak inference of discrimination, while the statistical showing in a pattern-or-practice case leaves a smaller possibility of race-neutral conduct. This suggests that *Burdine's* allocation of burdens may be inap-

propriate in pattern-or-practice litigation. Even if that allocation applies—as we assume today—what the employer must "articulate" is an *explanation* of its activity. *Burdine*, 450 U.S. at 254-55, 101 S.Ct. at 1094-95.

When the defendant pronounces a reason unrelated to the plaintiff ("a midget can't do the job", followed by silence on the plaintiff's height), it has not adequately articulated a neutral reason within the meaning of *Burdine*. The employer's burden of production means that it must introduce facts sufficient in principle to explain what happened. The ICG did not need to "prove" the validity of its explanation, but it did need to give one. In a pattern-or-practice case like this the employer need not show that distance accounted for the decision concerning any particular applicant, or that distance was important to rail operations ("business necessity"); it had at least to produce evidence that black and white applicants lived different distances from work.

[3-5] Just in case the evidence was sufficient to satisfy the burden of production, we add that the explanation was pretextual. The definition of a pretext, which we discussed in *Pollard*, is a statement that does not describe the actual reasons for the decision. The employer need not have "good" reasons, and a mistaken business decision is not on that account a "pretext". See also, e.g., *Friedel v. City of Madison*, 832 F.2d 965, 973-976 (7th Cir.1987), slip op. 15-20. But an explanation that does not convey the motivation for the decision is a pretext, and if the hypothesis of racial motive best explains the actions, then also a "pretext for discrimination". Cf. *Benzies v. Illinois Department of Mental Health*, 810 F.2d. 146, 148(7th Cir.1987). It is not likely that the ICG thought that blacks' greater distance from work explained anything. The data so explode the ICG's explanation that they also dissipate any possibility of good-faith mistake (i.e., the possibility that some explanation other than either race or distance explains the pattern). The ICG's explanation destroyed, the plaintiffs may prevail on their original

case, especially one of this strength. Cf. *Graefenhain v. Pabst Brewing Co.*, 827 F.2d 13, 17-18 (7th Cir.1987) (same conclusion under the ADEA, even on a weaker case). The *only* explanations that have been offered for the disparity (and the only ones we can imagine in the absence of evidence that the black applicants had some systematic difference in qualifications from the white applicants) are discrimination and distance. To debunk the explanation based on distance is to compel the acceptance of the explanation from discrimination.

[6] There remains only one possibility; that the ICG's studies, although failures as attempts to relate hiring to distance, undercut the plaintiffs' prima facie case of discrimination. They do not do so, however. Studies based on Census labor pool data rarely overcome studies based on actual applicants. Each data base produces some biases. When used to study unskilled jobs, each set of biases will favor the employer. As a result, an inference of discrimination from either is strong, and failure to replicate the inference using other data does not support a finding of no discrimination.

[7] Statistical analysis of the actual applicants has the advantage of self-selection: the study examines how the employer actually treated the people who wanted the job. Applicant studies are preferable as a rule because Title VII governs the treatment of applicants. What better statistical base than the people to whom Title VII applies? See *Movement for Opportunity and Equality v. General Motors Corp.*, 622 F.2d 1235, 1245 (7th Cir.1980). Cf. *New York Transit Authority v. Beazer*, 440 U.S. 568, 582-87, 99 S.Ct. 1355, 1364-66, 59 L.Ed.2d 587 (1978). See also, e.g., David C. Baldus & James W.L. Cole, *Statistical Proof of Discrimination* § 4.11 (1980). Self-selection introduces biases into the pool, however. One obvious effect is that if employers recruit marginally qualified people in an effort to make the job more readily available to minority workers, the difference in average levels of skill also may explain a lower rate of hiring the minority applicants. Baldus & Cole at § 4.124. The

ICG does not say that it recruited black applicants. There are other self-selection effects, however. To see this, consider how people decide to apply for the job.

People apply because they want the job more than their current employment (or prefer it to unemployment). Even those who want the job will not apply, however, unless they think they have some chance of being hired. They must travel to Carbondale, which may be a long and costly trip (costly not only in money but also in time, which includes income from other work foregone). To determine whether a study of applicants will identify an employer's rule of decision (taking account of race and taking account of distance are rules of decision), we must first know how the rule of decision influences who applies.

Take the first possibility, that the firm is using race as a rule of decision. If this is known—either to applicants or to those ubiquitous informational intermediaries, employment agencies, which act as applicants' proxies—it will deter blacks from applying. Cf. *Dothard v. Rawlinson,* 433 U.S. 321, 330, 97 S.Ct. 2720, 2727, 53 L.Ed. 2d 786 (1977) (sex discrimination). The firm could hire as large a percentage of the (few) black applicants as of white applicants while still discriminating. Discrimination not only reduces the number of black applicants but also increases their average level of skills. Only a (relatively) superior black worker would find the costs of applying worthwhile. The observation that the firm hires black and white applicants in such a pool with equal probability would show only that it is happy to hire high-quality blacks while it is satisfied to use medium-quality whites—people who could not get in the door if they were black. To put this differently, discrimination affects the applicant pool in a way that makes the discrimination harder to detect. The discriminating employer induces qualified blacks not to apply and these non-applicants—victims of discrimination as much as the non-hired applicants—will make the employer's hiring look "better" than it is. An applicant pool analysis is biased against finding discrimination, if

potential applicants know or suspect that the employer is discriminating. If a study based on applicants nonetheless implies discrimination, this is potent evidence.

An employer's decision to take distance into account also affects who applies. If the employer announces that it will hire only people who live within 50 miles of work, then only people with this characteristic will apply. It will make no difference whether blacks in the St. Louis district live farther from the ICG's yards than whites; the distant blacks will select themselves out. If white workers predominate in the vicinity of the ICG's worksites, and people know of the ICG's preferences, most applicants will be white. In equilibrium people will self-select so that each applicant has an equal chance of being hired—which will mean, if the ICG is race-blind, that the average distance from work of black and white applicants is identical.[2] Whether or not black people in the district live farther from the ICG, black applicants should be situated similarly to white applicants. This, too, produces a bias in the ICG's favor. If what the ICG says about its hiring policy is true, hiring rates of actual applicants by race should be similar even if the average distances of potential applicants are dissimilar. When the study shows a substantial disparity in hiring rates even among applicants, it has made a strong case.

Now consider the potential bias in a study based on population rather than applicants. The labor force in any county con-

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[2] One caveat. Societal discrimination against black workers would reduce the opportunity cost of their time. That is, black applicants on average would be giving up less income from other employment to apply for a new job, and therefore would travel farther and accept lower probabilities of being hired. The railroad then would hire a smaller portion of black applicants without engaging in discrimination. This undercuts, to an unknowable degree, both selfselection effects discussed in the text. It is impossible to believe—and the ICG does not contend—that this counterweight is large enough to account for disparate effects of the magnitude the plaintiffs established.

tains many workers satisfied with their jobs, perhaps because they are already earning more than the ICG offers to unskilled labor. Because black workers in any given labor force earn lower wages than their white counterparts, 1987 *Statistical Abstract of the United States* Table 680, and are unemployed more frequently, *id.* at Tables 664, 667, they are more likely to be available for unskilled work than are white workers in the same labor force. Knowledge that 10% of the workers in the "diminished civilian labor force" of a given county are black does not imply that only 10% of the laborers realistically available to the ICG are black. The ICG's offer will beat the status quo more frequently for black laborers than for white laborers. If 10% of the labor force in a given market is black, 20% or more of the laborers available to the ICG may be black. A study disclosing that the employer's hires match the color distribution of the "diminished civilian Labor force" (in this hypothetical, that 10% of the laborers are black) does not permit a confident inference that the employer is not discriminating.[3]

[8] The record in this case contains both applicant and labor force studies. Each kind of study, for unskilled labor, is biased against finding discrimination. When the applicant pool study produces a powerful inference of discrimination, and the labor force study produces at best a weak inference of race-neutral action, the plaintiffs have done what they must.

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[3] The bias comes from the supposition that the employer is hiring unskilled labor. It can easily be reversed if the employer is hiring skilled labor. That 10% of the workers in the labor force are black does not imply that 10% of the workers qualified to be aeronautical engineers or professors of Greek are black. Proof that an employer of engineers hired in proportion to the race of the labor force as a whole would acquit it of discriminating against blacks. We mention this to reinforce the point that it is necessary to review the inferential process case by case; the biases of one study in one case may be avoided or reversed in the next.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

December 7, 1987

No. 86-2381

ROBERT EARL MISTER, on behalf of himself
and all others similarly situated,
Plaintiffs-Appellants,

v.

ILLINOIS CENTRAL GULF RAILROAD
COMPANY,
Defendant-Appellee.

ORDER

Defendant-appellee filed a petition for rehearing and suggestion of rehearing en banc on November 27, 1987. No judge in regular active service has requested a vote on the suggestion of rehearing en banc, and all of the judges on the panel have voted to deny rehearing. The petition for rehearing is therefore DENIED.